Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

KEY TO THE 90s

Privacy and Information Access

Toronto
November, 1988

PROCEEDINGS OF A TWO-DAY CONFERENCE ON MAJOR ISSUES CONCERNING FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY IN ONTARIO

KEY TO THE 90s

Privacy and Information Access

Tuesday, November 22, 1988
and
Wednesday, November 23, 1988

Holiday Inn Downtown, Toronto

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PREFACE

This two-day conference, the first of its kind in Ontario, addressed provincial freedom of information and privacy issues and made comparisons with other jurisdictions, both provincial and federal. The speakers and panelists, all experts in their area, dealt with the emerging issues and addressed the administrative, technical and practical aspects of using this type of legislation.

The conference, sponsored by the Freedom of Information and Privacy Branch of Management Board of Cabinet, also looked at the impact the Ontario *Act* will have on municipalities and local boards when they come under the statute in 1991.

The conference was considered vital for all access professionals, whether in the private or public sector, and drew an audience of more than 450. Panel participants included Freedom of Information and Privacy coordinators, information management officials, lawyers, journalists and those involved in administering, developing and interpreting Ontario's access and privacy law.

A variety of issues were explored during the two days: the impact of the *Act* on local government; similar legislation in Quebec and other parts of Canada; current key issues facing information and privacy experts; how the appeals systems in Ontario and those in other jurisdictions differ; the extent of the involvement of the business community; how journalists view the *Act*; and how medical records are affected by the privacy provisions.

Keynote speakers included the Honourable Murray Elston, Chairman of Management Board of Cabinet, Ontario; John Grace, Privacy Commissioner of Canada; Inger Hansen, Information Commissioner of Canada; Mr. Justice Horace Krever, Supreme Court of Ontario; Sidney Linden, Ontario's Information and Privacy Commissioner; and Carole Wallace, Commissaire, Commission d'accés à l'information, Province du Québec.

By agreement with Management Board's Freedom of Information and Privacy Branch, these proceedings were recorded and distributed by the Office of the Information and Privacy Commissioner/Ontario. To the extent possible, this is a verbatim transcript of the two-day conference. Editing has been kept to a minimum. There has been no attempt to change the substance or content of what the various speakers said. We hope that this permanent record will be of some value.

March, 1989

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Tuesday
November 22, 1988

Theme: Freedom of Information Issues

Opening Remarks

John Sloan, Secretary
Management Board of Cabinet
Toronto, Ontario

For those of you who do not know, I am John Sloan, the Secretary of Management Board of Cabinet and it is that cabinet committee which administers the Freedom of Information and Protection of Privacy Act for the Ontario government.

You know it is a rare occasion when a piece of legislation attracts so much direct public interest and scrutiny and clearly, this is one of those times. Indeed, your presence here today is a testament to that. Believe it not, when we were planning this conference, we anticipated a relatively small gathering of about 100 people. Instead, we have an attendance figure in excess of 450, including lawyers, journalists, community college and municipal officials, police and teaching association representatives.

Now, before we get the sessions going this morning, I would like to establish at the outset that the government is committed to the twin goals, and I underline twin, of providing the maximum in freedom of information while at the same time, protecting the privacy of individuals, groups and corporations who deal with the government and its agencies. I think it is fair to say that it is an ambitious undertaking. When we implemented the legislation in January of this year, Ontario joined a select group of provincial governments, the eastern provinces and Quebec, who had also undertaken this commitment. Since then, Manitoba has also enacted its own law and in so doing, takes this trend one step further across the country.

You are here I know because you really want to know what implications this legislation has for you and the impact it will have on your associates. Therefore, the purpose of this conference, hopefully, is to answer those questions and concerns. For those of you soon to be included in the freedom of information and protection of privacy legislation, I mean here the community colleges and municipalities, I especially hope that the next two days will prove enlightening and prepare you for the tasks ahead.

We will have, I know, a good opportunity in the time available to exchange ideas and information about this new law and legislation and how it is working so far. At today's session, we are concerning ourselves with the issues that surround the freedom of information side of the legislation, the similar roots, the delicate issue of third party access to information, and the additional costs in information management. We will also have an opportunity to find out how similar laws are working in the Federal and other Provincial jurisdictions.

At tomorrow's session, we will be concerned with the privacy side of the equation. In particular, we will investigate the legal implications of balancing personal and corporate privacy concerns with the public's right to know. We can expect to delve into some of the emerging issues that are affecting privacy rights across the country, including changes in hiring and competition practices and relative advances in computer technology. I must say I am looking forward to a very informative and, if you will, quite lively conference and I hope you are too. It is now my pleasure to introduce to you the Director of Ontario's Freedom of Information Privacy Branch, Frank White, who will get our first session under way. Thank you very much.

Frank White, Director
Freedom of Information and Privacy Branch
Management Board Secretariat
Toronto, Ontario

Good morning. I am particularly pleased that my organization has been able to sponsor this first conference on these very vital issues in this province. The theme for this conference, which is Key To The Nineties, Privacy and Information Access, was deliberately selected, very deliberately selected so that we could point out, during these two days, some of the balancing that has been going on in this province and some of the experiences other provinces have had with this very vital type of legislation.

I believe that these next two days are really going to draw your attention to these issues and focus in on what are some of the key issues that are going to be affecting us in the next decade, issues that we are interested in, in the area of access to information and in the area of privacy. Now, while the first panel is getting organized up here, I would just like to go over a few of the administrative details for the conference.

First of all, there has been a really overwhelming response, as John Sloan mentioned and we are really pleased at the turnout. It might be a little crowded but we have done a few things to make it as comfortable as possible for you over the next few days. First of all, there is no smoking in any of the conference rooms. So, that should help us with the air situation. The coffee will be served in three locations: in the other ballroom, immediately to the right; in the other conference room, which is straight across the other side of the escalators, as you came up; and in the reception area.

The conference activities are being recorded, and if you are interested in a transcript, if there is enough interest, the Office of the Information and Privacy Commissioner can be contacted. They have made arrangements for the recording of the proceedings.

Now, there are a number of panels, breakaway panels for the two days, and the code that you have actually is not a unique identifier to take the place of the Social Insurance number. That is actually a code for the three sessions that you have selected and that code is in the material that has been handed out for the conference and the conference guide.

The three panels that will be handled in this room are: the one on Third Party Information, A1; Local Government, 4; and Human Resources Management, C5. All the other conference panels will be held directly across in the Elizabeth Room.

Now, in terms of lunch, lunch will be held both days in the Commonwealth Ballroom Centre and West and those rooms are right at the back, directly to the right and then to the right and this afternoon, at today's lunch, we are very pleased to have the Minister, The Honourable Murray Elston, who is responsible for Ontario's Legislation, as the keynote speaker. If you have asked for a special lunch, if you will let the waiter or waitress know at the time the lunch is being served, they will take care of the arrangements that you have made. Also, each day, there will be a cash bar.

We have tried to make sure that there is ample time, during the lunch breaks and during the refreshment breaks, to allow you to mingle with other delegates and discuss the issues, and discuss the issues with our speakers. I think you will find that all the speakers are really first rate. I, myself, am really looking forward to the next few days. Lastly, your conference folder, if you have picked one up, if not, there will be one at the Registration Desk, has further information on leaving telephone messages. If you have any questions about where to go or need information about the city and also information about displays which will be set up during the next few days, or if you have any questions, just go to the Information Desk. They can take care of you.

Now, for the first panel, if I could ask Tom Riley to come up and we will start the proceedings. Thank you.

EMERGING FREEDOM OF INFORMATION ISSUES

Tom Riley
Riley Information Services
Toronto, Ontario

Good morning. Welcome to the Key to the Nineties. I would like to start by saying I think it is very interesting that we have started off with our distinguished panel this morning. Certainly, we want to come to grips right away with some of the "emerging freedom of information issues" as it is being called.

Many of you here today are coordinators and are already coming to grips with these issues on a daily basis or you might be an administrator or someone in another function in a ministry, whereas many of you here today as I can see by going through the registration list, are from the community colleges and municipalities and of course, many of our colleagues from Ottawa. So, I feel it would be only appropriate to start with this panel to lay out the range of issues that have been confronting us up until now and of course, will as we move into the nineties and the spreading out of Ontario's Freedom of Information and Privacy Act to the municipalities and other sectors.

I would like to start off by introducing the panelists. I think what I will do for you is introduce them, all three of them now, and the order of speakers is going to be, first, Lisa Philp. Lisa is a graduate of the University of Toronto in 1980, with a Bachelor of Arts Degree in English and she came into government and has had many interesting positions and her work on Freedom of Information and Privacy started in 1986, when she was appointed as the Freedom of Information and Privacy Coordinator with Ontario Hydro.

She went on, and was seconded to Management Board where she was involved as a Policy Advisor on freedom of information and since 1987, she has been fulfilling her duties at Ontario Hydro. So, she is well qualified to speak to us this morning about some of the issues faced as a Coordinator at somewhere like Ontario Hydro and we look forward to that.

The next speaker is going to be Norm Rubin. Norm is the full time researcher for Energy Probe. He has been involved in this for many, many years, since 1978, which is a long time. He has a Bachelor of Science Degree from Massachusetts Institute of Technology. He has been an expert witness before many Federal and Provincial Government committees on energy and environmental issues, writing a number of briefs and studies for Energy Probe and many of you might have seen him on national television a few weeks ago on some very interesting issues he may or may not tell us about today and he has appeared in many other fora, including interviews in national newspapers we recognize, such as the Globe and Mail, The Citizen and in many magazines, in speciality publications and he has appeared on virtually every major radio and television current affairs and news show in Canada as well as being interviewed by publications such as the New York Times and he also served in 1986/87 as a member of the Steering Committee of the Ontario Environment Network. From such a rich and varied background, we can look forward to a very interesting contribution this morning.

Finally, but not least, it is my pleasure to introduce the Federal Information Commissioner to you, Inger Hansen, to our far right. Inger has been in the Ombudsman, Arbitrator, Mediation type role since 1973. She has a long and distinguished history. She originally came to Canada as a young woman and she was born in Denmark but received her Bachelor of Law from the University of British Columbia in 1960.

She then practised law for many years in British Columbia and then moved on to Ottawa, where she had a position in the Juvenile Department of the Solicitor General's office and from there, she was responsible for the revisions of the Juvenile Deliquent Act. In 1973, because of this background and many other reasons, she was appointed as Canada's first Correctional Investigator or as was known, a Penitentiary Ombudsman and then, in 1977, she had the distinction of being Canada's first Privacy Commissioner. As a Commissioner under the Canadian Human Rights Commission, she was responsible for Section 4 of the Canadian Rights Act, dealing with personal information and then, in 1983, she was appointed by the Canadian Parliament, for a seven year term, as Canada's first Federal Information Commissioner.

I think we have gathered together an interesting panel and without further ado, I would now like to bring up Lisa Philp.

Lisa Philp, Coordinator Freedom of Information and Privacy Ontario Hydro

I think it is kind of interesting that Norm Rubin and myself from Ontario Hydro are on the same panel. I guess Frank thought it would be kind of interesting to start things off with a bang. We promise to do any brawling outside.

As with any new piece of legislation, the Freedom of Information and Protection of Privacy Act has given rise to a myriad of issues, both procedural and interpretive. We have to determine when and how fees will be charged; what to do when a third party notice is required; how to determine whether a time extension is required; and so on, but the thing that strikes me about this Act is that it also challenges us on a more profound, almost philosophical level. In my opinion, the greatest challenge facing the Commissioner's office, the Coordinators and Institution heads over the next few years, is the need to establish a balance between what are legitimate but often conflicting interests.

The Act establishes the framework wherein we must balance the public's right of access against the individual's right to privacy; the interest of third parties against the greater public interest; and the often legitimate requirement for confidentiality within government institutions against the need for greater accountability.

The extent to which we can reconcile these interests without compromising the spirit and intent of the legislation will ultimately determine its effectiveness. As you know, the structure of this Act is somewhat unique. In most other jurisdictions, access and privacy rights were enshrined in separate statutes. At the Federal level, we have an Access To Information Act and a Privacy Act under two different commissioners. In its recent review of the two acts, the Standing Committee on Justice and Solicitor General actually recommended that the offices of the Access and Privacy Commissioners remain separated in order to avoid any real or perceived conflict of interest and in recognition of their distinct and unique mandates.

As the title suggests, Ontario's Freedom of Information and Protection of Privacy Act combines these two important rights in a single statute with a single Appeal body. On one hand, the Act gives the public the right of access to most information held by government institutions. On the other hand, it recognizes the need to protect what is becoming an increasingly fragile right to privacy in the computer age.

So, how does one reconcile these two principles when they come into conflict? To begin with, the Act contains a mandatory exemption for personal information. This means that a person requesting a record under Part II or the access portion of the legislation, will generally be denied access to information about other identifiable individuals. I say generally because there are a number of exceptions to the exemption. For instance, information can be released if disclosure would not constitute an unjustified invasion of privacy. To assist the head in making this determination, the Act provides a kind of balancing test. All relevent factors must be considered, including the degree of sensitivity of the record; the rights of the person making the request; and the accuracy of the information. The resulting decision is largely discretionary. However, the Act also contains a notice provision which requires the Head to notify affected individuals and give them the opportunity to make representations as to why the record should not be disclosed. When you think about it, this is an interesting concept.

The Act establishes that privacy is almost a sacrosanct right and creates a mandatory exemption to protect it only to then state that not only may personal information be disclosed to a third party, but the onus is on the affected individual to convince the institution, in some instances, that it should not be released. It should also be remembered that most disclosures of personal information do not occur as a result of an access request.

Part III, or the privacy portion of the legislation, sets out a list of routine allowable disclosures of personal information. Once again, we encounter some extremely subjective language. For example, personal information may be disclosed for the purpose for which it was obtained or compiled or for a consistent purpose, whatever that is. It may also be released to an employee who needs it for the performance of duties which are necessary and proper to the institution's functions and now, my personal nemesis, personal information may be disclosed in accordance with a statute or a treaty, agreement or arrangement thereunder. Does this allow institutions to enter into informal agreements or arrangements involving the disclosure of personal information even where those arrangements conflict with the stated purposes of the Freedom of Information and Protection of Privacy Act?

I am aware of one situation where an employee has challenged an institution's right to disclose personal information to a union, under the collective agreement, without the employee's consent. This raises the important question of which is paramount: the individual's right to privacy or the union's right to obtain information in the collective interest and in accordance with an agreement under the Ontario Labour Relations Act. I will not belabour the point, pardon the pun, except to say that balancing privacy and access is more difficult sometimes than it seems.

To quote the Williams' Report of 1980,

"Privacy is a particularly vulnerable interest. In any given case, it is the interest of one individual or a relatively small group, while against it are set the interests of the public in being fully informed, in security from crime, in having policy makers and administrators with full and up-to-date information. Consequently, in any given instance, the public interest will seem overriding. Yet, in the long run, protection of the interests of every individual in privacy will have gone by default".

The need to achieve a fair and equitable balance is also apparent in the area of third party information. The Freedom of Information and Protection of Privacy Act applies to all records in the custody or control of government institutions. This includes information submitted to the government by private sector third parties. Business information makes its way into the hands of government officials in a number of ways: as part of the tendering process; for regulatory and licensing purposes; during statutory inspections; in applications for grants or financial assistance and so on.

These activities are undertaken by government in the public interest and I am sure that most of us would agree that to exclude them from the ambit of the Act would severely undermine the effectiveness of the legislation. However, there is a recognition in most Freedom of Information schemes that the informational assets of the business should not be generally available. That is, information which, if disclosed, would impair a company's ability to compete in the marketplace. A scheme which allowed such disclosure would ultimately discourage business investment and make it much more difficult for government institutions to obtain necessary information.

So, how do we ensure that the public interest is served without jeopardizing the legitimate interests of the business community and without imposing impossible burdens of proof on either requestors or third parties? The Freedom of Information Act provides, once again, a mandatory exemption for third party information but only where certain specified criteria are met.

Firstly, the information must be of a specified type. It must be scientific, technical, commercial, financial, labour relations information or a trade secret.

Secondly, it must be information which has been supplied by the third party to government in confidence and thirdly, there must be some reasonable expectation that disclosure of the information would result in one of three types of harm, specified in the exemption. If the record in question fails to met one or more of these criteria, it must be released but before this can take place, any affected parties must be notified of the intended disclosure and given an opportunity to make representation. If, on the other hand, all of the criteria are met, the record is still subject to the so called public interest override, which states that the exemption does not apply where a compelling public interest in disclosure outweighs the purpose of the exemption.

So, once again we are presented with an interesting proposition. The Act provides mandatory protection for third party information if a number of rather subjective tests can be met and if there is no overriding public interest. Furthermore, the onus for demonstrating that the exemption applies seems to lie with the affected third party, who by the way is not covered by the Act and in all likelihood knows very little about its operation, and what about third parties that cannot be contacted? Do we simply disclose what could be commercially sensitive information and hope for the best? It is interesting to note that Federal Crown Corporations are excluded from the Access to Information Act, though that may change, while the Ontario Act covers all Crown agencies, including Ontario Hydro, the Liquor Control Board, and the Lottery Corporation. Striking a reasonable balance between the public's right to know and the interest of third parties is particularly important for these agencies.

Even where a virtual monopoly exists, they must still operate in a commercial environment, which demands certain standards with respect to the confidentiality of information.

The challenge for all institutions over the next few years will be to ensure that the access principles of the Act are fully upheld without allowing the legislation to become simply a convenient means for businesses to obtain commercially valuable information about their competitors. Achieving a workable balance is perhaps most important when the public's right to know conflicts with some legitimate requirement for confidentiality on the part of government. The underlying premise of any freedom of information scheme is that government institutions should be open and accessible to the public but there is also a recognition that the disclosure of certain types of information would not serve the public interest.

The exemptions in the legislation, together with the severability provision, are intended to provide the critical balance between public access and government confidentiality. Unfortunately, it is not always that simple. To some extent, we in government are the product of a long tradition of secrecy.

Our very system of government with its doctrine of collective ministerial responsibility is in some respects inconsistent with the principle of openness. Furthermore, the Public Service and Official Secrets Acts create statutory deterrents to the release of information by civil servants.

My very first request under the Freedom of Information Act involved information which had been compiled as part of an investigation into uranium cartels in the early 1970s. The records were over 15 years old and much of the information was already available to the public. So, I was a little surprised to discover that I could be contravening the Official Secrets Act by disclosing that information. My boss pointed out it was a darn good thing I looked good in stripes. In addition to the Public Service and Official Secrets Acts, there are about 130 confidentiality provisions in other Ontario statutes, which are now being examined in light of the new Freedom of Information law. None of this tends to foster a climate of openness. Anyone who has read Inger Hansen's Annual Reports will be familiar with her concern that, for many Access Coordinators, the career risks associated with releasing information can tend to outweigh the benefits of properly administering the Act.

So, inevitably, we begin to see roadblocks emerging, like lengthy time delays, excessive fees and the sometimes inappropriate use of exemptions. This can lead to appeals and in the case of Ontario's Act, the number of appeals could be extremely large. Unlike the Federal legislation, the Ontario Act provides only a limited right to judicial review. The Information and Privacy Commissioner has the ability to make a binding order disposing of the issues raised in an appeal. While this may be discouraging for some very sophisticated users of the Act, it will be extremely encouraging, I think, for the average user, who might be reluctant to initiate a formal judicial proceeding.

In order to keep appeals to a minimum, a climate must be created within government which allows the Act to operate effectively. Coordinators and others responsible for administering the new legislation must receive a clear message that their performance will be measured by how well they comply with the spirit and intent of the Act. Ironically, the success of the new legislation will depend on our ability to create an atmosphere of openness where there is no longer the need for a legislated right to access. Thank you.

Tom Riley

Thank you, Lisa, for those excellent overviews and insights. I think we see now what is facing us in the next two days in trying to balance this question of Freedom of Information and Privacy. I would like now to have Norm Rubin come up.

Norm Rubin, Research Director
Energy Probe
Toronto, Ontario

Thank you. It is nice to be here. As you have been told. I am Norm Rubin. Make no mistake. I am not Ken Rubin for those of you who are insiders in the field. I feel a little bit like John C. Turner in this crowd because I am sure, turnabout is fair play, Ken must go around enough in Ottawa fielding questions from people who confuse him with me but, in this room, I think it goes the other way around and I am the Rhino candidate.

My own personal involvement with Freedom of Information, in fact, dates back to a phone call quite a few years ago from Ken Rubin when the Act was brand new. In fact, I am not sure it had been proclaimed yet and Ken, who for those of you who do not know his name, is probably the human bulldog who has pursued the Act provincially and federally more than any other individual. Cousin Ken I call him. We are actually not related. Thanks to Ken, one can read the minutes of the Atomic Energy Control Board where they speculate on whether we are related or not. I took the phone call and it was from Ken Rubin and he basically said, 'There is this new act and I am sure of all people and all institutions who would love to get some documents out of the Federal Government, Energy Probe is near the top of the list. What would you like to have?' and I said, 'How about minutes to the Atomic Energy Control Board and their advisory committees?' and he said, basically, 'Okay thanks, see you around.' Click; and about every six months or nine months or a year and I suspect we could corelate my datebook and Ken's with Inger Hansen's on the subject, there would be another phone call and I would have to send off a little letter or something or make some argument as indicated and approximately three years later I had in my hands the minutes of the Atomic Energy Control

Board and there were a number of interesting tidbits in them, of course, including documents that led to something like five or six articles in the Southam Newspaper chain which had actually footed the bill. There were, I forget, a few hundred dollars charges involved in getting the materials out and a number of the documents were interesting enough that the Ottawa Citizen and the rest of the Southam chain thought they were worthy of the public seeing what trade-offs had been made on nuclear safety in the public's name but for me, as I have already indicated, the highlight was toward the end where the Control Board was discussing and recorded in its own minutes the fight that they were waging to make sure that nobody ever saw those minutes. It was in that context that they wondered whether Ken and I were related. For the record, we are not.

The other thing, of course, that came out in those minutes for those of you who were paying attention to information issues at the time, was a discussion in the Control Board about how much less informative their minutes should be in future than they had been in the past and they made a decision that they should be less informative and that prompted a Globe and Mail editorial and so, the matter rests for now.

In short, I am here in an advocacy role. I think basically information should be public with the possible exception of my information and I suspect I have that in common with many people in government who would draw the line at their information but in general, advocacy groups, environmental groups, anti-nuclear groups will be, like the public I believe, on the side of more openness. I do not think there are many people in the Canadian public or the Ontario public that feel that they voted yesterday in order to elect a government so that that government could feel it has a mandate to gather information and keep it from us. I just do not think there are many people who think that that is really a legitimate role of government except in very proscribed circumstances. Of course, the irony is that the rules about access to that information are written by the guardians of that information and this means we are going to have a consistent tug of war, I think, for many years if you are looking for the Key to the Nineties in access, it is going to be a continuation of that tug of war with the public and what I like to call public interest groups and some of my adversaries call special interest groups, vying for more exemptions or higher fees, mandatory fees, longer delays, more exceptions, etc.

I think, for example, federally, the recommendations of the Federal Justice Committee are probably going to come to pass. I hope I live to see the day and I hope we will see Federally and Provincially, a system that is easier, friendlier, cheaper, quicker and as I say, I am enough of an optimist to be confident that that will eventually happen. There are some indications in the short term that we may be stepping backwards. Federally, for example, as many of you know, there are a number of laws that have specifically -- that have their own secrecy provisions which override the Access to Information Act.

That may be a trend. It is not a trend, I think, with public support. It is a trend with obvious government support, especially in those departments whose information is being discussed.

I would like to, first of all, touch on a number of related issues. I think access to information, freedom of information is really only a subset of what I would view as the public's need for access to government and for accountability in government. For example, much of the information that I get that is useful that somebody wishes I had not gotten, is not obtained through freedom of information legislation or appeals. I, myself, have been a very light user. Some of my colleagues -- we have an international branch of our organization called Probe International, which deals with the environmental impacts of aid and trade, rainforest depletion and things of that kind - they have actually been major users of the Federal law and have scored some significant successes and I had some significant frustrations.

For example, some of you may have seen about a month ago an article about the details of an arrangement between the Thai government and the Canadian government, specifically, Atomic Energy of Canada Limited, to market, to send a photoradiation unit to Thailand and, among other things, to accept irradiated foods back from Thailand, which are now illegal to market in Canada but there was another clause in the contract that said we would try to change our federal laws to make those legal. That document came out as a result of my colleagues' action under Access to Information, despite the fact, I might point out, that our favourite federal agency, Atomic Energy of Canada Limited, is not covered by the Act. It came out because External Affairs had been involved.

A number of other things that I believe will change - Chief among them, I think, is the issue of whistle blowers' rights. Much more useful information has come my way under plain, brown paper than in response to access acts. Some of you may have seen I think the reference we were hearing before from Tom about the national television I was on was as I was waving a 43 page document that leaked out of Atomic Energy of Canada Limited and which was their database that they had been keeping on environmental groups with a number of interesting plans for how to discredit some of us and how to penetrate our computer network and a few other interesting recommendations that had been passed from the director level of Atomic Energy of Canada Limited to the vice president level of Atomic Energy of Canada Limited and that is a document that I think it is clear that Hell would freeze over before we would ever get that through any access legislation in existence or likely to be in existence soon and it came out because somebody within the institution,and I do not know who it is and I do not want to know who it is -- that's not completely true -- part of me is glad I do not know who it is. The person is glad probably that I do not know who it is although, yes, I can be trusted - if anybody in the room is wondering, I can be trusted, but somebody within Atomic Energy of Canada Limited, I guess, took a look at the fact that AECL was spending money to investigate the weaknesses of environmental groups and their strengths and to look at opportunities for AECL, which usually meant ways to discredit or ways to penetrate in some way and reacted the way, I think most human beings outside of AECL would react, which is to say, this is wrong, this is crazy, this shouldn't be happening, and I would assume that somebody within the bureaucracy of AECL had very few options to make it stop and perhaps the only one was to put it in a plain brown wrapper with my address among one or two others on it.

We are actually not totally sure that it has stopped, by the way. You will be hearing more about this in the future. The point about that is that the person who responded that way and I think it was in general, I suspect if you had the Gallup organization I need not tell you about pollsters this week but if you had any one of those illustrious people we all saw on television last night poll the public for how they felt about the person who released the document that showed Atomic Energy of Canada Limited was spying on the Canadian Environmental Network and Friends of the Earth and Energy Probe and others, I suspect that we would come out on top and AECL would come out on bottom and the person who released it would be seen as a person of conscience who did what we wish more people would do. I am not sure, I have not run the poll, but that is my guess. Of course, that person's standing is in great jeopardy.

If that person is discovered, Gallup will not save him and public opinion will not save him or her, I should say, because the person who released those documents has absolutely no rights and even in cases where public safety is involved, where great environmental insult is involved, the person who is told to dump the poisonous material down the sewer or the person who is standing next to that person, neither of those -- we do not even really have a right to refuse to pollute, much less a right to rat on your boss who is ordering the pollution and in fact, one case that I think has not gotten anywhere near the publicity it should is -- some of you may have heard of it -- an Ombudsman's case recently in Ontario from somebody in the Sheriff's office, a Joseph Delbert Adams, we just got a decision, which I think would do very poorly in the Gallup polls and I think rightly so, in which the Ombudsman decided that a man who was dismissed directly after a meeting at which he confronted his superior with wrong-doing, which was later admitted by the superior in a different case, the superior was fired and in the grievance procedure, the superior admitted that yes he had taken those things, those publicly owned things home for his kids and you know, he had done all those things that Mr. Adams confronted him with in the meeting but what he responded with immediately was by firing Mr. Adams -- or technically by not renewing his contract which had already been signed and so, it came to the Ombudsman, it has come twice to the Ombudsman, and the Ombudsman decided, and I can read you some juicy passages, that say basically that the accusations were correct, the accusations of wrong-doing but from the boss' point of view, he didn't think he'd done anything wrong and therefore, his employee really was insubordinate and it's natural to expect a boss to fire an insubordinate employee, even though the insubordination was pointing a finger at somebody who was breaking the rules and perhaps the laws and accusing him of breaking the rules and perhaps the laws.

Well, again, I think if you tried that on the next ten people who walked by on the sidewalk and said, 'How should this person be treated?', I don't think the Ombudsman's answer is the answer and I think we are going to have to have some legislation that gives meaningful protection to people who point out things that should not be happening. For environmentalists, this is going to be very important and one of the things I think that has to be protected is the rights to violate some levels of corporate and institutional secrecy where the courts, perhaps, decide that that is in the public interest. The decision cannot be made ultimately by the generator of the information.

Some related changes that I think have to come are meetings in "sunshine" laws. That is, the need for as many decisions as possible to be made in public and access to courts for review of decisions. For example, environmental rights so that somebody can sue a polluter without having to prove the very -- there is a very high hurdle to get into the courts now to get standing but of course, the courts give you, although they are a nuisance as Lisa Philp mentioned, it's not easy going to court, Energy Probe knows that, but you do get discovery proceedings where information can come out where that's in the public interest.

Now, one of the things I have to admit at this point is that not only am I a light user, an occasional user of access to information legislation but I think most environmental advocacy groups have also been light users and I partly apologize for that. I partly look to the future when we will get a little more comfortable with the legislation but I partly blame the legislation and its lack of user friendliness and, specifically, there are two things that environmental groups and other social change or advocacy groups, public interest groups don't need. One is more financial expenses and the other is a more boring paper and of course, most raw government files would be boring for most of us, including perhaps the people that generated the files.

It is said that in the typical uranium mine, one is lucky to get a couple of pounds of uranium out of a ton of ore. I think that may be a good ratio for most raw government files but of course, until you know what's in the files in some detail, it is very hard to tell which three pages are going to be the ones that you really wanted to look at and again, that is where whistle blowers have the advantage. They are staring at the paper that is outrageous and it is precisely that sense of outrage that means what comes in the brown envelopes to me is usually the stuff I do want to read, whereas what comes in response to access requests is often material I wish hadn't spent the time to read.

So, in closing, I think the long term future for access and for "sunshine" and for accountability is clear. The timetable is not clear. Whether we will move two steps forward and one step back or for a while, one step forward and two steps back, is still to be decided but in general, the time has clearly passed, I believe when Canadians and Ontarians will stand by. Certainly when toxic materials, hazardous facilities, environmental issues in general, public health issues, are discussed and especially discussed anywhere near their homes or their place of business and somebody indicates to them that there is information but they cannot have it.

Thank you.

Tom Riley

Thank you Norm. I would like to comment on the whistle blowing. It seems to me that as you have an increase of openness legislation like Freedom of Information legislation, you develop an aura of accountability which seeps itself into government and I've noticed looking back and comparing what is going on here and the examples that Norm gave in the United States, you actually saw a rise of whistle blowers in the late 60s, early 70s, which was in time coincident with the passage of the Freedom of Information legislation and it has gotten to the extent now in the United States where you actually have legislation dealing with whistle blowers because it's recognized as a part of good government that a whistle blower should actually not be penalized for what he did, if there is a greater public interest.

To compare that, if you look at the United Kingdom, they have had consistent problems with whistle blowers and every time there is -- every year around this time, somebody comes out with some startling thing -- it used to be about the fifth man before Kim Philby died -- then, you know, 10 Downing Street, madly running around, appointing some prestigious members of the House of Lords to look into and inquire why we are sending everybody to Brixton Prison and all this is in all the headlines and a week later everybody has forgotten about it and then five weeks later or maybe five months later, a little thing comes in on the back page of the Times and it's Lord Scarman reported today that there is no way to find this person who released this report. But the point is, they keep trying to plug the dam and you don't. There is always somebody in government who'd want to do that. I think freedom of information is just a natural extension of whistle blowing and maybe we'll see some change here in Canada. There are some good examples today. We will see what happens.

I wanted to say now before Inger comes to speak to us that we will have an opportunity for questions from the floor as soon as we are done, excuse me, as soon as Inger's finished speaking and there are, as you noticed, two microphones situated in the room. So, I will direct questions after Inger. Inger, please.

Inger Hansen
Federal Information Commissioner
Ottawa, Ontario

Thank you very much, Mr. Riley. Ladies and gentlemen, isn't it wonderful to belong to a growth industry. In 1977, I could possibly have gotten together a meeting of 12 people interested in privacy. You are now looking at a woman with some years of experience. I have grown older and sadder, somewhat disillusioned. I hope a little wiser.

As I was listening to the other speakers, Mr. Sloan, the key word to what he said to you was balance and that has been echoed by Lisa Philp today. She raised the questions of interpretation of attitudes, I think, and she talked about balance. Norm Rubin talked about the whistle blower and here too, is room for balance. I would like to throw out to you the example of the Swedish legislation. By law, you are perfectly entitled as a public servant to be a whistle blower. However, the press cannot give out your name and neither can you. Think about it.

Mr. Rubin also talked about the Atomic Energy Control Board. It brought back fond memories to me because that was in the early days of the work of our office. I had a complaint-handling office with the power to investigate, very thoroughly, very intrusively, and the power to make recommendations and do you know what? The Atomic Energy Control Board accepted my recommendation. We didn't have to go to court. That came later and today, it is questionable whether we would be as lucky.

I would like to suggest to you that a good law is not enough. The Federal Access to Information is a good law. It makes a policy statement of the legal rights that the government has accorded people living in Canada. It outlines exemptions that create a fair balance between individual, corporate, organizational rights and the rights of society as a whole. It sets out the process. It provides for fees and it attempts to provide a time frame within which information must be released. That time frame is honoured within its reach constantly and very effectively at the Federal level. It is intended that Access to Information legislation should lead to greater openness in government. I believe it will be but we may be into 2001 before we see the results. Such an act has to establish an orderly process and an independent review. Every law in Canada on the subject does do that.

I spoke about the fair balancing. I think every law in the country does that and the timely fashion is an issue where the jury's out. I agree with Mr. Rubin when he says that one should use the informal process. There is no doubt that that is the means by which you should get information from your government and I also think that is a way that eventually bureaucrats, administrators and politicians will give it out. At the moment, there is an incredible discrepancy between the amount of money that the government spends on spooning out information and the amount of money that is spent on the administration of these acts and the delivery of the service under them. I think that imbalance must be corrected because, in my mind, access to information requests, when made in a formal manner, are indicators that someone has taken the trouble to consider what they would like to know. They go through a labourious process to tell the government and the administration, 'This is what we would like to know' and it must be frustrating as a member of a sophisticated democracy then to find out that it takes years and maybe you do not get everything that you are interested in. I think the time must come when government and administrators must see access requests as indicators of public interest.

In addition to a good act and good procedures, we need good commissioners, whether they have decision-making authority or not. These commissioners, as well, must have investigators and those investigators must be imaginative, thorough and plodding because I thoroughly agree that many of the files are boring and they will be boring for administrators to read in order to disclose and sever and claim exemptions and they are boring for the person who receives it, but I think that is beside the point.

The issue here is openness, not whether the record that the person asks for is boring, nor whether it is meaningful after severance. I firmly believe that when severance takes place that it does not behove the one who holds the information to say, 'This is not meaningful for you,.' or 'This won't do you any good and why should you bother to have it.' That is for the user to decide. That is what the law says. The commissioners themselves must be intellectually honest and curious. They must be committed and above all, they must be independent.

The independence can be created in law but I suggest to you that it also has a bit to do with character and size of mortgage and number of kids in university and your ability to find another job when you are through. Above all, the commissioners must be fair and I ask all of you who are users and those of you who are bureaucrats that the hardest thing in this world is to be fair, to compromise and to balance equally competing interests. As usual, when you compromise, nobody thinks you have done a really good job, but you must remain fair. You must walk that tightrope, interpret the law and come to fair, and again it is to be hoped, timely solutions. In the end, I think it comes down to three things once the law is in place. Attitude. An attitude that in a modern democracy, the public has a right to know subject only to very serious other considerations. It comes down to a question of money too because if a government is not prepared to provide a sufficient amount of resources to the departments, the municipalities in your case and whatever, to deliver the service, you won't be able to deliver the service. If the commissioners do not have a sufficient budget, they will not be able to deliver the service either and then, of course, one has to accept as well that the government does have many priorities. Access to information is only one.

In the end, therefore, I suggest to you that it is a question of Political will and I would spell that with a capital "P" and a small "p" and by that I mean, a will of the bureaucracy because there is no doubt in my mind that information is power. It was said a long time ago; it is true today as well. Those who hold it have nothing to lose by stringing out complainants and users if they have not got the political will to be open.

Thank you.

Tom Riley

Thank you, Inger, indeed for that very challenging talk. I think very thought provoking and hopefully now it will lead to some very stimulating questions as I think all three of our panelists this morning have given us a lot to look at and to discuss and we do have 15 minutes. So, there are two microphones and I am willing to entertain questions now. All right, I will start with the first question.

Perhaps one of you might give us some suggestions on, you were talking about government programs and there is a new Federal communications policy out now and we are also talking about the number of monies spent on public relations programs and also, of course, the amount of government information that is released is quite phenomenal when you think about it. Perhaps my question might be, has anybody suggestions on, with the new information technologies, what opportunities lie ahead to make information available even after requests, for example, are being made in departments. What kind of possibilities now become available to make information available through using information technology? Any thoughts from anyone on this?

Inger Hansen

The possibilities are infinite both to organize your records and distribute them. I think without the modern technology, we would not have the possibility of giving access on a large scale. However, we must not forget that this legislation is retroactive and covers 100 years of paper records.

Norm Rubin

I just have a small example of modern technology working well to access information. None of this is prime, sensitive information out, but environmental groups across the country are linked by an electronic mail and conferencing network, sponsored by the Canadian Environmental Network and recently, the Federal Department of Environment and FEARO, the Federal Environmental Assessment Review Office have both been granted limited access to that system so that they can, basically, they can't browse through the rest of the conversations but they can upload. They can deposit information for all to see in that network and that has led to a great increase in speed of the dissemination of new announcements from those departments. Whereas most of us had to wait for first class mail, we would always read about the new developments in the newspaper before we got the official documents and now we can see the official documents usually before we even hear about it on radio. It is interesting, mentioning modern technology, that the main barrier to the further use of that, not in the case of FEARO but in the case of the Federal Department of Environment, is that there are, apparently, not too many people in the relevant departments who are comfortable enough with computers to actually do this linkage. So, we often have to say, 'Wait, we hear there was a new policy, can you find somebody who can use a modem to send this to us?' and certainly, as the technology advances, I think fairly soon, we are going to see a more meaningful linkage between computers and FAX machines. When that happens, I think we are going to see material in people's hands very quickly. Again, this is not the most sensitive information but it is timely information.

Lisa Philp

I would just like to add one thing to that and that is that not only does the provincial act give the user the right of access to records that are existing records in the custody or control of a government institution but to records that can be compiled using computer technology that is available within the institution, hardware, software, technical expertise that are available to that institution. So, it greatly expands. It takes the 20th Century into account, the fact that we are in the 20th Century and that we are dealing with these technologies and it expands greatly, I think, the user's right of access to information.

Tom Riley

Thank you, and thank you everyone. This lady here, please.

Anne Gray, Coordinator
Freedom of Information and Privacy
Ontario's Ministry of Consumer & Commercial Relations and Ministry of Financial Institutions

Yes, you may have heard about a recent decision of our Provincial Commissioner concerning the identity of requesters? This is that the identity of someone who has made a request, an access request under our Act, is not necessarily confidential and I think this came as a bit of a surprise to all of the provincial and agency coordinators. We had assumed that this type of thing would be considered as sensitive, personal information. I was wondering what had happened if there have been any decisions Federally on that or what is your opinion about this?

Inger Hansen

The Federal Act would protect the name of a requestor. It is frequently that a third party would ask us if we knew the identity of the requestor if we would'nt mind giving it out and then we have to say that that is not material because under an access act, when something is out, it is out. So, that there is no protection in the giving out. So, that at the Federal level, thanks to the strengths and the vigour of the Privacy Commissioner, I do not think that the requestor's name is out unless it is, as is possible, with consent and that has happened in some cases.

Tom Riley

I actually as a user have had many occasions when I have been called by a Federal coordinator asking me if I want to have my name released to the requestor. I always say no.

In the United States, it is just a natural evolution over the years, if you want to find out who made the request, you just call up and ask. It is a tradition that has developed there and there are no legislative restrictions. So, it looks like we could be developing different approaches in our legislative bodies here in Canada.

Yes, sir?

Audience Question (Unidentified)

My question is addressed to Mr. Rubin. I was sort of somewhat surprised that you seem to condone whistle blowing and I just wondered, most civil servants are -- when they start their job, take an oath of secrecy and an oath of allegiance to the Crown, which is -- and we know full well what they are doing at that time, do you not think then that a whistle blower should be subject to the penalty of dismissal for violating that particular oath that he has taken?

Norm Rubin

I think obviously there are competing interests and in many cases, government secrecy is not in the public interest. I think it is very tough for the people who generate the information to decide where that balance lies and therefore, I think ultimately, the courts and alternatively, an all powerful Information Commissioner, but I personally favour and I think most advocacy groups would favour judicial review of commissioners' decisions as the ultimate balancing act to see -- I mean you know, I have no trouble constructing scenarios or even finding real scenarios from the past where I view whistle blowers as heroes and where I think the vast public would view whistle blowers as heroes with perhaps 80 to 85% to 15 to 20% and most of that 15 to 20% being the colleagues of the whistle blower or somebody else who helped generate the information, obviously. It's easier to operate in secret than it is public. That's true for all of us but as I say, I think the right -- for example, unsafe activities at a nuclear generating station that are known to a regulator -- real experiences we've had, especially south of the border where whistle blowing is a much more time-honoured tradition than it is here.

Although, there have been cases up here. You may recall in 1979, so called M. Schultz who turned out to be a Mr. Tavis who leaked a bunch of secret safety documents which, in hindsight, even Hydro admits never should have been secret. Those documents are now public and documents of their kind are now public. Those documents were leaked to show that the sequence, the links in the chain at Three Mile Island had all individually happened at Bruce in the three or four years that it had been operating. They hadn't happened together but every link of the chain had happened, despite soothing statements that were coming out of Hydro. That was extremely important information. That person felt that he had to resign. He has moved out of the country. I am not sure if he is doing well or not but I know he is not working where he used to work and the story that I hear and, perhaps Lisa Philp or somebody else can correct me, but the way I heard it is that he resigned just before one of his colleagues was fired because the bosses thought that his colleague had leaked the information. I think that is the wrong way to treat somebody who is giving the public something the public has a complete right to know.

Inger Hansen

I am just suggesting that there maybe many hero whistle blowers in society and none of us will deny that but on the other hand I think the whistle blower must sometimes pay the price and often becomes a martyr. There is no doubt about that.

However, to run an orderly society, you cannot let everybody in a given organization decide what is right. The whistle blower may not necessarily be right and may cause mischief from time to time. So, that is the balancing again.

Tom Riley

As they say, those are the breaks. Yes, sir?

Audience Question (Unidentified)

One thing that it strikes me the Ontario act does is extend the Federal act and address the question of Crown corporations, and municipalities. I am wondering if you can speculate on the next extension and whether any Canadian legislation is likely to deal with private sector information, private sector databases, perhaps following the British Data Protection Act or the OECD guidelines?

Tom Riley

I will, if I may, comment first. What is happening now actually is that the Federal legislation is in the process of being extended to Crown corporations on both the Access to Information Act and the Privacy Act. Perhaps I could be corrected from the audience if I am wrong on that but I understand that process is on-goingnow. As to extension to the private sector, I think both the Parliamentary Committee Report which did recommend extensive incursions into the private sector was basically not accepted by the Government. If you read the report, called "The Steps Ahead", essentially what I think the approach that is going to be taken is that there will be a wide extension of the Privacy Act into the Crown corporations and eventually, including corporations like CBC, even though I understand that is under advisement and study right now, but eventually the plan is to bring all Crown corporations, but as far as the private sector goes, it seems that the current strategy will be to actually educate the private sector, to encourage them, through educational programs and through programs to be developed by the Federal Government, I believe will come from both the Justice Department and Treasury, to encourage them to develop their own privacy codes and in that way, enact privacy protection in Canada. The feeling has been that it is not ready to take the European or the British route which is to extend full data protection acts to the private sector. Are there any other comments?

I do not think we are going to see that also with the current government. Interesting enough, I did think that one thing that might have come up in the Free Trade discussion, not that there wasn't enough already, was the whole question of harmonization of privacy laws between the two countries but it never became an issue. It had been recommended by the Royal Bank back in 1984, at a conference that the then Conservative Government of Ontario sponsored on privacy and that was a very big issue at that time but I think it has fallen way into the background and there was this, of course, with all the things that are being mentioned, it is the furthest thing from anybody's mind and it does not look like it will come up.

Norm Rubin

Tom, if I could just comment briefly on one extension, in a sense, to the Federal legislation. It is slightly peripheral but when my colleagues at Probe International have been seeking information, for example environmental assessment documents prepared, funded by the World Bank are typically exempted because the World Bank does not allow them to be publicized and Canada cannot publicize something obtained from another country or from a multi-national institution like the World Bank without getting the permission of the generator of the information.

An understandable exemption but in the case of the environmental assessment documents, we think a ludicrous exemption because a secret environmental assessment document is of little use certainly to those most affected. In that circumstance, we have seen a bit and we hope we are seeing, I should say, a bit of an end run around the problem through the actions largely of Michael Wilson who is Canada's Governor on the World Bank, who has managed to persuade most of the bureaucracy of his department and most of the bureaucracy of the World Bank that changes should be made and so we are going to get some limited access to those documents but what was necessary was not a change in Canada's Access to Information Act allowing the breaking of secrets but a change in the World Bank secrecy provision.

Obviously, it is a little bit harder to fight the World Bank than it is to fight Ottawa, and fighting Ottawa is harder than fighting City Hall, but in this case, some progress has been made. It is in danger and there is more to come but a number of things like that;......when we need the permission of the Ethiopian government to release a document that was prepared in their country, what we need to do in future is simply have mandatory openness provisions in our Foreign Aid dealings and just say, 'Look, we don't fund secret projects. That's not what the taxpayers of Canada want to do in their generosity. So, if you want to keep it secret, then sorry, we're going to have to give our money to other hungry people,' or somehow do it in other ways -- fund non-government organizations who agree to disclose the information. There are other ways around some of these problems but they are still problems.

Lisa Philp

Just to add to that, briefly, it is interesting to note that under this Act, under both acts actually, third party information that is provided say by the private sector businesses has to go through all these hoops before it can be withheld even though it is a mandatory exemption in the legislation. If it is information that is provided by a third party government, and that can include our own Federal Government which has its own access law, that can be withheld just by virtue of the fact that it is considered confidential by that government. It does not have to pass these......

Norm Rubin

......it must be withheld federally......

Lisa Philp

......there is a discretionary exemption in the provincial Act but the fact is, it does not have to pass these harms tests, these very stringent criteria the way private sector business information does.

Tom Riley

Okay, well, thank you. I think we will end up the questions there because there are a lot of us here this morning and we all want to make a mad dash for the coffee as we need a jolt now but thank you very much to our panelists for a very interesting morning. May I just say please, the next panelists will start at 10:45.

The "Information Resources Management" will be in the Elizabeth Room, which is directly across the hall and of course, the "Third Party Information" will be in here. Please, of the panel of your choice, show up exactly at 10:45 and as you have been told, there are three places for coffee. Thank you again for our panelists and thank you audience.

THIRD PARTY INFORMATION: TOO MAY PROTECTIONS OR TOO FEW?

Pierre Trottier, Access Coordinator Federal Department of Regional and Industrial Expansion Ottawa, Ontario

The subject of our panel is Third Party Information: Too Many Protections Or Too Few? By way of backdrop to this topic, I would like to briefly outline some of the legislative and judicial experience in dealing with the U.S. Freedom of Information Act, a law originally enacted in 1966.

Protection for third party information is afforded in exemption (4) of the U.S. Freedom of Information Act. As with other exemptions under the Act, exemption (4) is discretionary in nature. This is in contrast, of course, to s.17 of the Ontario law and s.20 of the Federal law which provide mandatory protections for third party information.

Some critics have decried the commercial use of the U.S. FOIA as a general fishing expedition, weakening government programs by deterring cooperation from regulated parties, and distracting agency resources and personnel from substantive functions and increasing the commercial advantage of sophisticated firms over competing firms. It has been estimated that in the U.S., 80% of requests for information to Federal agencies, excluding the FBI and the CIA, have been made by businesses seeking to learn the secrets of their competitors.

Some companies have suggested that the use of the FOIA for such purposes has become a vicious circle. While companies might not have originally conceived of employing the Act in this manner, such use of it by their competitors has compelled them to do likewise for fear that the failure to do so would ultimately place them at a competitive disadvantage. Now, exemption (4) has been criticized for being too vague and leaving too much to judicial interpretation.

Lawyers have also cited difficulties associated with the "substantial injury test" developed by the courts. For example, the assessment of the likelihood of injury may require a sophisticated understanding of the competitive issues that agency personnel, charged with making the decision, sometimes do not have. Also, it is contended that gathering the evidence required to keep documents from exposure is so costly that only the largest corporations may make the effort.

Unlike the Federal and Ontario laws, there are no statutory pre-disclosure notification and appeal rights given to third parties under the U.S. FOIA. Until 1987, U.S. agencies adopted a myriad of individual rules and procedures to deal with the notification issue, some raising due process questions. For example, in the Supreme Court of the United States case of Chrysler v Brown, the agency involved denied Chrysler's confidentiality request citing as follows:

> "This decision may be appealed. However, due to the time constraints, we cannot wait for the results of such an appeal. Accordingly, the subject documents will be released within five working days after your receipt of this letter."

However, last year President Reagan, through Executive Order, instituted a pre-disclosure notification requirement for records submitted by businesses. The Executive Order, however, does not apply to independent agencies like the FTC. As for appeal rights, third parties have had to basically resort to law suits under the Administrative Procedures Act to prevent the disclosure of information by government agencies. As I said, there is no appeal mechanism in the U.S. FOIA itself.

Amendments to enhance the protection of business information under the U.S. FOIA have been the subject of intense review and discussion for many years. The issue has tended to polarize groups involved, such as the public interest groups on one hand and the business community on the other. Largely because of the difficulty of obtaining a consensus in Congress, amendments dealing with business information have never been adopted. Now, it is not hard to imagine that Canadian decision-makers may have had the foregoing issues and experiences in mind when the Provincial and Federal Access statutes were conceived.

Have we gone too far in Canada in ensuring safeguards for business information? Have we gone far enough? Have we struck the right balance? Here to explore the important questions are three distinguished panelists.

First, we have Mr. Glenn Bell. In more recent times, Glenn was general counsel for the office of the Ombudsman of British Columbia. Since 1987 to the present, he has been in private practice, has acted as counsel before the CRTC, for example, the NEB, the Federal Court, the Supreme Court of Canada. His main clients have been the National Anti-Poverty Organization and the Public Interest Advocacy Centre. He is currently the Associate General Counsel for the Public Interest Advocacy Centre.

Next, we have Penny Bonner. Penny is a partner with the law firm of Osler, Hoskin and Harcourt. Her areas of specialization are corporate law, federal administrative law, access to information, including both seeking access and protecting information on file on behalf of corporate clients.

Next, we have Mr. Eric Novick, who is the Coordinator, Freedom of Information and Privacy for the Ontario Ministry of Health. Prior to jumping from the frying pan to the fire, Eric was a city planner for the Municipal Affairs Ministry. I would now like to call upon Glenn Bell, please.

Glenn Bell, Associate General Counsel
Public Interest Advocacy Centre
Ottawa, Ontario

Thank you very much, Pierre. I would just like to talk about third party protections and in the course of doing that, I want to compare the Federal and the Ontario legislation briefly and make some editorial comments as I go along from the point of view of the consumer. In my view, there are three main topics under the heading of third party protections. First of all, there are the issues of the exemptions for third party information and the exceptions to those exemptions. Secondly, there is the public interest override and third, there is the third party objection procedure.

Before getting into these, however, I would just like to remind everyone that the basic purpose of the freedom of information legislation is to enhance the accountability of the government in its administration of public policy by allowing the citizen to have the necessary information upon which to form a rational judgement as to the adequacy of that administration. Accountability of the government to the citizenry is, of course, a hallmark of democracy. The exercise that we went through yesterday is one method of accountability but it only happens every four years. On-going accountability for the daily administration of government is an equally important aspect of democracy and freedom of information is one way of promoting that type of accountability. It helps the citizen to know if the government is doing its job properly.

Bearing that in mind, I would just like to refer, first of all, to the fact that in both the Federal and the Ontario acts, there is a presumption that there is a right of access to government-held records. In Ontario, it is in s.10; in the Canadian Act, it is in s.4. This right is, of course, subject to certain exemptions for third party information. I would like now to deal with some of those exemptions.

As Pierre mentioned, the first thing we notice about the exemptions in both laws is that they are mandatory. If the qualifications for the exemptions are met, then the information cannot be disclosed and this has implications for the public interest override section in the Federal act, which I will mention later. As for the types of information that are protected and the circumstances in which they are protected, there is a certain degree of overlap between the Federal and the Ontario legislation but the Federal act, however, is much broader in terms of the exemptions that are granted. I will just mention them briefly.

First of all, there are trade secrets. There is a blanket exemption for trade secrets in the Federal law. There is an exemption for confidential information of a financial, commercial, scientific or technical nature. There is an exemption for information which could result in material financial loss or gain to or could reasonably be expected to prejudice the competitive position of a third party, which I call "market disruption"," a market disruption exemption" and there is an exemption for information which might be expected to interfere with contractual or other negotiations. Again, this is a type of market disruption exemption and that is in the Federal law.

In the Ontario law, the situation is much different, although the types of information that are protected are essentially the same; that is, the trade secrets, scientific, technical, commercial, financial or labour relations information. All of that information must be confidential in the first place and it must meet one of three injuries tests listed in the Act and they fall into two categories.

The first category is a market disruption test. Again, the injury to competitive position or the interference with contractual relations or undue loss or gain to any person or group, etc. These are market disruption tests that must be met or there is what I call the security of future information flow test, which is basically to protect the government. If the disclosure would result in similar information no longer being supplied to government, where it is in the public interest that similar information continue to be so supplied, then an exemption applies. So, there are two basic types of tests in the Ontario legislation. There is a market disruption test and a security of future information flow test.

The latter test is absent from the Federal legislation. So, you see that the Ontario law is much more restrictive in terms of the types of exemptions and the circumstances in which they would be allowed than the Federal law is and,in my opinion, is much less open to abuse because of that. Let me give you an example of how there could be a different result depending on whether the Ontario law or the Federal law was applied. Suppose, for example, and this is taken from a real example, you had a refusal to release the chemical formula of Ureaformaldehyde insulation. Under the Canadian law, this would be classified as a trade secret and as soon as that happens, disclosure is prohibited.

Under the Ontario law, although it would be classified as a trade secret, there would nevertheless have to be shown that the release would result in some demonstrable injury, either market disruption or a threat to the security of future information flow to the government. Notwithstanding the fact that this substance has been banded on public health grounds, and that there is no market for it, the Government of Canada has refused to release the chemical formula.

Another example of how information would be treated differently under the two acts concerns confidential financial, commercial, scientific or technical information. Under the Canadian law, the Federal law, no injury needs to be shown. All that has to be shown is that the information was supplied in confidence and that it was kept confidential; treated confidentially. Whereas in Ontario, again, some injury must be shown, some likelihood of injury must be shown in order to satisfy the requirements for the exemption. Simply because it is confidential, it is protected under the Federal act but it would not necessarily be protected under the Ontario act and in my view, the absence of any injury test in these categories in the Federal law is the most problematic part in that section.

Now, the Ontario legislation is good. It is an improvement on the Federal legislation but it is not perfect either. For example, the exemption for information that might interfere with contractual or other negotiations. Now, what does that mean? What is interference? Nobody really knows. It could be just what the party says it means and it is therefore open to broad interpretation. At the Federal level, there has been some evidence that it is also open to abuse where information was requested of a company and it was denied on the grounds that it might interfere with the contractual negotiations in the collective bargaining situation when, in fact, no negotiations were taking place. The union was on strike and had been for several weeks and there were no real negotiations going on and yet the exemption was claimed. I think what is needed here is a substantial harm test in both the Federal and the Ontario legislation.

Another exemption that I think needs to be given a certain amount of critical review is the exemption for prejudice to competitive position. Ontario has the advantage of modifying it, at any rate, by requiring that such prejudice be significant. Again, here, the views of the parties as to what constitutes prejudice to competitive position can be somewhat expansive. Our experience has been that the competitive atmosphere in which some industries operate has led to an excessive sensitivity on the part of some companies as to what their exposure would be if certain information were released and there was a tendency on the part of some government departments to accept this view uncritically.

I would also like to make a comment on the requirement that in the Ontario legislation if information release would jeopardize the security of future information flow, I think we have to have some regard here for the reason for which information is supplied to the government and when it comes to commercial information, it is usually supplied for the purpose either of influencing public policy or getting some sort of economic benefit and I do not see why if the information is supplied voluntarily for the purpose of moving the government to some action, that that information should not be made public. If the government action itself were to be made public, and we can be sure that it will, how can a citizen judge whether that action was correct if the basis for it is kept confidential? I am thinking here, for example, of grant applications, licences, consumer complaints, tenders.

If freedom of information is truly to be an effective method of holding the government to account for its administration, then why should this type of information be held confidential and not released? The third party always has the option of supplying it and living with the consequences. Of course, I would say that if the information is coerced, or if it is purely personal information supplied for the purpose of obtaining an entitlement, the situation is somewhat different. In that situation, there would be a breach of privacy over which the party would have no control and it should not be compelled to disclose it to the world.

Now, there are a certain number of exceptions to the exemptions. In both acts, there are exceptions for product and environmental testing. In the Canadian Act, this is s.20(4) and in Ontario, it is s.18(2) and it says that information that relates to the results of product or environmental testing shall not be refused to be disclosed unless the testing was done as a service to a person or a group of persons, etc. for a fee. Now, this is an exception that has been, in my opinion, well, some advantage has been taken of it in a number of recent cases and I think the problem here is that it was a good idea in its initial conception but the wording of the section has not really impressed on people, especially those who are responsible for disclosing the information, that the phrase "as a service" is intended to cover a situation in which the testing was done as part of a commercial operation by the government, the same as if they were in the testing business.

Instead, it has been expanded to include cases where the testing was done as part of a requirement that the third party had to submit to in order to get some government approval and a fee was charged for that test as part of a cost recovery program.

I think there needs to be some perhaps revision to this section or at least some better education as to the meaning of the phrase "as a service". If the test was necessary for the agency to do its job, then why should that be disclosed? If it was done as part of a business, then no problem, but if the agency required the information in order to make a decision, then I think it should be disclosed. Well, that is all I would like to say on the question of the exemptions.

Both acts have a public interest override. The Federal law has a discretionary override with limited grounds. That is health, public health, public safety and environmental protection. If there is a greater public interest as a result of any of those three factors, then the government agency may disclose the information. In Ontario, the situation is somewhat different because the test is different. There has to be a compelling public interest in disclosure and the grounds are not limited and where there is such a compelling public interest in disclosure, the exemption does not apply and we get back to s.10 where there is a right of access. So, it results in a mandatory disclosure.

In my view, the Ontario test is preferable, although it too could be manipulated. It should make a difference but whether it will or not remains to be seen because,of course, it would be easy enough to say that there has been no compelling interest to disclosure shown. The Federal Department of Justice has urged a narrow interpretation of the Federal public interest override and pointing to the mandatory aspect of third party disclosure.

Finally, the third party objection procedure, as you are aware from this morning, the third party objection procedure, federally, allows the third party to go directly to the Federal Court for a ruling on the merits; whereas, in Ontario, the Information Commissioner is the one who makes that ruling. It is only subject to a limited form of judicial review. I think there are advantages and disadvantages to each system. On the whole, I would say that a system that requires a court action in order to come to a final determination of the merits favours the big guy over the little guy, generally speaking, and I think for that reason, I tend to view the Ontario system as being superior. The question is balance. I have given you a fairly partisan view of how I think the balance has been achieved or not in these two pieces of legislation. I think they are both good pieces of legislation. The fact that we have heard no complaints or very few complaints, at any rate, from the business community regarding the Federal law tends, in my view, to support the conclusion that it is somewhat overbalanced in favour of that community. Thank you.

Pierre Trottier

Thank you very much, Glenn. I would now like to call upon Penny Bonner, please.

Penny Bonner, Partner
Osler, Hoskin And Harcourt
Toronto, Ontario

Let me just pick up on Glenn's closing remarks that the Access to Information Act, the Federal Act, must be over-balanced in favour of the business community because he hasn't heard any complaints. I am certainly going to be speaking from the perspective of one who has been trying to resist disclosure of certain information for third parties and I will definitely admit my bias. I do not think that the Ontario Act goes far enough to protect third party information. I think that the Information Commissioner, federally, has managed to strike the proper balance in terms of third party information and the interpretation of s.20.

Let me just run through and I will try not to repeat the things that Glenn had said or that Lisa said earlier this morning about the differences between the two Acts. Most of my experience has been with the Federal Act and I think there is something that can be learned that is valuable from that experience and the comparison of the two. Glenn talked about the four tests in s.20 and I think that that is very important that you realize there are four alternative tests and the third party only has to meet one of them.

There is a general trade secret one. There are the two injury tests in s.21(c) and s.21(d) and if you look at s.21(b), which I call the "confidentiality provision", I think you have to realize that there are four sub-conditions that have to be met to meet that test. It's got to be the right type of information: financial, commercial, etc. It's got to be confidential and that has been interpreted as meaning confidential according to some objective standard. It's got to be supplied to the government institution by a third party and it's got to be treated consistently in a confidential manner by the third party. So, I think when you realize that there are the four sub-conditions to be met, that test is fairly strict. The objective standard to be met plus the factual evidence that the third party has indeed treated that information confidentially.

The two that are most recently or most frequently used are s.21(b) and s.21(c) and as Glenn pointed out, on the confidentiality, there is no need for the third party to show any evidence of injury and similarly, on the injury test, there is no need to meet the confidentiality conditions. As opposed to that, in

Ontario, you have the three full tests that must be met: the type of information; that it was supplied in confidence to the institution; plus meeting one of the three injury tests in s.17. Now, I think if you take some time to look at the two Acts; it is almost as if the Ontario statute said, 'Okay, you have to meet, in terms of the Federal Statute, you have to meet s.21(b), the confidentiality provision, plus one of the two injury tests in s.21(c) or s.21(d).' So, it is a much more onerous provision for a third party to meet.

The other differences between the two Acts as they relate to third party information and Glenn talked about the public interest override, the only thing that I would add to that, and I am not sure that he mentioned it, was that in the Federal Act, the public interest override does not apply to a trade secret. That was the example that he was using. The other difference between the two Acts is there is no Federal equivalent of s.11 of the Ontario Act and that is the provision that obligates the Head to disclose where the record reveals a grave environmental health or safety hazard to the public.

The other difference and, I am sure most people have not noticed this and I think it is very important, and it relates to whether or not the Head must disclose the existence of the record. In s.10(2) of the Federal Act, that discretion is given to the Head in all cases, whether or not he must, in response to an access request, say whether or not the record exists. In the Ontario Act, it is only confined to two situations. Only in the case of a law enforcement exemption or in the personal information exemption can the Head refuse to disclose whether or not the record exists and I think the Information Commissioner, Inger Hansen, has opined on this at least once, that there are situations where the very disclosure of the record could cause the injury identified in s.21(c) of s.21(d) of the Federal Act. Simply by saying that there is a record can cause the injury that could result from disclosure of the contents of the record.

I think one of the things that is interesting is the differences between the two statutes can really be highlighted by the Meat Packers' cases. The Federal Court of Appeal came out with its decision in July of 1988 and Commissioner Linden came out with his order in, I believe, September of this year and the Federal Court of Appeal, this is their first pronouncement on s.20 and it has been extremely helpful, this was that the request for the inspection reports that are prepared by government inspectors of the meat-packing plants and the Federal Court of Appeal said s.21(b), that confidentiality provision, just could not possibly apply because this was not information that was submitted by the third parties, it is merely the judgements of the government inspectors as they are walking around the plants and observing what the conditions are, and they also decided and gave us some assistance in interpreting the injury tests in s.21(c) and s.21(d). They held that the test that has to be met for that is whether there is a reasonable expectation of probable harm and I really do not see any reason why that same type of interpretation should not apply to the injury tests, s.17(1)(a) and s.17(1)(c) in the Ontario Act.

The Federal Court of Appeal, as had the trial division, reviewed in detail all the evidence of injury that was submitted by the third parties. They found the evidence generally to be too speculative and said that it was really premised on an assumption that these reports would be the subject of irresponsible reporting by the media. They also seemed to be really persuaded by the fact that for two years in Canada, between 1981 and 1983, the reports had been made available to the public and they had also been available to the public under the U.S. Freedom of Information Act since 1972. The third parties could not show any evidence to the Court of damage that had resulted from those previous disclosures. I think that was evidence that they found quite compelling.

Now, when it came time for the Ontario appeal, Commissioner Linden looked at the three full tests that had to be applied for s.17 and he said the third parties did not even manage to get over the first hurdle of that three part test. That it was not even the right type of information. That the reports did not contain trade secrets or scientific or technical or commercial or financial or labour relations information. Now, thank goodness he did not leave us hanging on that one but he also went on and said even if it had been the right type of information, he did not feel that it would have met the other two tests either. That it was not information that was supplied by a third party and that the third parties had presented no evidence of an allegation of possible harm. So, here you have the results being the same in both cases, the reports being released but the methods of achieving them being very, very different, plus the length of time it took to achieve them, but all Commissioner Linden had to do, applying the tests in s.17 was to find that it was not the right type of information.

One of the problems that I have with the Ontario Act is, and I will concede that I have to accept the wording of it and the fact the Canadian Bar did not get all the submissions that they wanted accepted by the government in tightening up s.17, but in terms of the way it is being implemented, I think that there are deficiencies and that there should be improvements. Let me just run through the way I typically deal with third party representations, based on my federal experience.

The first step is the government department sends out its third party notice and usually what they do in the situations I have been involved in is, they will have decided that they intend to disclose the documents, subject to severance. They have already decided that some portions of that document should not be disclosed to the requestor.

Now, what they do is they blackline the document and mark beside the black lines which paragraph of subsection 21 they believe the exemption falls under and exactly which information they feel should be deleted and usually it is (b) or (c) of s.21. Once the client gets that, we sit down and discuss it and most of the clients, if this is the first experience with freedom of information legislation say, 'Oh, nothing can be disclosed. Nothing can be disclosed. Absolutely nothing can go out.' So, you really have to take them through an educational process and say, 'Listen, this is the 90s. This the 80s and this is the new legislation. This is "Sunshine" and convince them that in very few cases will they be able to claim total exemption for the document.

When we look at the facts to support a claim of exemption under s.21(b), is it truly confidential information? Is it confidential according to some objective standard? Have they treated it consistently in a confidential manner? Then we look at s.21(c), how could the information be used by a competitor? What kind of financial loss could be caused by disclosure and the interesting part is that the government in their severance schemes often do not realize how a competitor can use the discrete bits of information that appear to be innocuous separately but the client knows exactly how a competitor can put those pieces of information together and cause him competitive disadvantage.

So, usually what we end up doing is proposing an alternative scheme for severance and I guess I have to admit that in most cases this means asking for more deletions than the government has proposed but I have had some situations because the client knows exactly how the information can be used and because the client knows exactly what is in the public domain that we have suggested to the government and agreed to the disclosure of certain portions that they were going to delete.

So, once we have gone through this exercise, then I can draft a representation, a third party representation detailing the facts, underlining the claim for confidentiality under s.21(b) or the evidence of probable harm under s.21(c) and if we are going in with an alternative severance scheme, what I usually do is prepare a whited-out-version of the document that will show exactly what we want deleted. So, there is no confusion with the Access Coordinator when they receive the document as to exactly what we have consented to disclose.

If that is how it works federally, what have been the problems to date provincially? First, I do not think that third party notices are being given out when they should be given out. I think there are instances when they are being missed and I think that third party rights are being prejudiced because of this. When the Federal Act came in, Treasury Board guidelines issued strict instructions that when third party information was involved that the Access Coordinator was not supposed to start second guessing whether s.21 would apply. That the third party notice should be given and I feel that this is what should be done in Ontario. That whenever there is third party information involved, unless the Head decides that he is not going to disclose anything out of that record, the third party notice should be given. That those coordinators should not be put in the position of having to guess whether s.17 applies and if he decided to sever and disclose only part of the record, he also has to give third party notice and give the third party a copy of his proposed severance scheme.

The second area where I think that the implementation is defective is I think that copies of the records should be given to the third party along with the third party notice. This is done federally and I think it leads to more intelligent and coherent representations being made by the third party. I think that the provisions of the Act, of the third party provisions in the Ontario Act can work as they were intended to work. If the government implements procedures, if the Coordinators implement procedures, that will permit third parties to make well reasoned representations and to propose reasonable schemes for severance. I found that severance is just the ideal means of reaching a compromise under the Federal Act and I guess, let me make just one point that I am discouraged and concerned that it may not be the same kind of solution under the Provincial Act and this stems from Commissioner Linden's Meat Packers decision where he held that the Ministry had severed out the name, location and plant number of the meat-packing plants from the inspection reports, was going to disclose the substance of the inspection reports, he looked at the information that had been severed and said that that did not meet the first test of s.17 and that meant that the only alternative for the Ministry in attempting to reach this compromise was to sever out the guts of the information and leave in the name and plant location number. I am afraid that this is a narrow interpretation of the legislation and that it may discourage attempts by third parties to cooperate and propose schemes for severance that will achieve the balance that we have all been talking about. Thank you.

Pierre Trottier

Thank you, Penny. Now, I would like to call upon Eric Novick.

Eric Novick, Coordinator
Freedom of Information and Privacy
Ontario Ministry of Health

Thank you, Mr. Moderator. One of the props I was going to bring with me today was a sign I could hold up periodically saying, 'I am not a lawyer.' The sign wasn't made but I would like you to visualize that as I talk.

I would like to start off with the premise for you as well that the views I am about to express are my own personal opinions and do not in any way represent those of the Ministry of Health or how we necessarily administer the Act in the Ministry of Health. The third thing I would like to do is ask you two questions so that you can tell me a little something about you so I can wing this as we go along. One, how many of you here are from the private sector? Can you put up your hands, please? Okay, that is a safe audience. How many people in the room are lawyers, regardless of private or public venue? As expected, okay.

Access and privacy, balancing, too many protections, too few, it is safe to say it is inherently a subjective issue on a case by case basis. We will try to stay away from too many platitudes but I think that one is a safe one. It is subjective but you have got to start with certain underlying premises when you have to work with a piece of legislation like this. One of the premises, it seems to me, is that this Act was put in place to create access, not to protect information. It was put in there to create access and when you are balancing, that's got to be a consideration. It should not outweigh the consideration of protecting corporate or personal privacy. I think the parallels between the two are very strong. Damage to reputation of an individual can be damage to the interest of a firm. It can be equated to it in many ways in terms of its reputation. It seems to me that the issue of what is confidential and what is not is part of the obsession, I have noticed across the government is that if you need an exemption, look for s.17. It is one of the favorites. It is very clear cut if something is a Cabinet record or a law enforcement record or solicitor/client privilege but s.17 along with s.18 and s.13 are certainly very fertile to interpretation.

I found it interesting that Penny commented that when she goes to a client on a third party notice, the first reaction is disclose nothing. Interestingly enough, Penny, our clients are of the same nature because when I go to a Branch Director, that is most often the response that you are going to get and that is in both instances reasonable and in both instances, severances and common sense are how you sort out that initial gut reaction because, just as the business community has, over time, expected that everything they gave to government was seen as confidential, if they stamped it on the cover, people who receive that information, public servants who have to deal with their clients on a day to day basis, their concern is not FOI issues, their concern is serving their client and they have a strong attachment to the notion that what their clients give them stamped confidential, is to be treated that way. So, I think there are some parallels in that regard. Where does that leave us with FOI?

Well, the first issue on this panel today is, is the protection adequate for business interest? In my opinion, yes it is and I will give you a couple of reasons why in a moment. Second assumption is to treat commercially significant information in the same way as personal information. If in doubt, don't give it out! Err on the side of privacy protection, whether it is corporate or personal privacy.

Part of the challenge in implementing this new system is going to be waiting for some of the decisions to come from the Information and Privacy Commissioner's office over time to narrow some of the boundaries of the issues. Narrow some of the boundaries of the legislation but in my review of the decisions that have come out to date, I do not think that there has been enough test cases or cases that have narrowed that for us. So, I think we are still going on the basis of the Act.

Why are the protections adequate? This concept of natural justice, which most of the lawyers in the audience will be familiar with, and it seems to me the underlying premise of the concept of nature justice is threefold. One, is that people have a right to have notice of things that affect them, whether it is a company or an individual. The Act provides for that. Secondly, the right to make representation on how something affects you. The Act provides for that as well and thirdly, independent review process and independent review process that is accessible to people, and that is not costly to adjudicate the disputes. I suggest the existence of notice, representation and independent review fulfill the reasonable expectations of natural justice.

I would also like to comment to you on why there is this independent review process with no appeal to the courts as in the Federal legislation. Having sat through clause by clause review of this legislation and watched the Legislators debate this, I can tell you and this is a fairly accurate paraphrase of the Attorney General, Ian Scott in Hansard, which was, we do not want a review to the courts, we want the decision to be made principally by an acceptable commissioner where people do not have to go and get lawyers and hire them and spend money to get information that we are saying in this document they have a public right to. The intent clearly, and you can go back to Hansard and the debate is there was to ensure that it was a one-stop decision-making process by a commissioner where people could make their own representations on the access side and that they could get decisions that did not take the time of going through the Federal Court and taking extensive periods of time to review the decision and decide whether people would or would not get access. That is to me the most distinguishing feature of Ontario's law against the Federal law.

The fact that the decision is made by an independent commissioner with authority to order disclosure, clearly tells you the intent of the legislation versus the Federal legislation and I would like to predict today with some confidence that in three years from now, when a similar conference is held, and there is a comparison of the two Acts from the perspective of which Act is getting information out to people that they are asking for, the Ontario Act will stand the test in terms of which Act has created more access.

I suspect my slant on this issue is beginning to show slightly. Okay, one of the issues in dealing with s.17 is the reasonableness of administration. There are all kinds of questions. The question is how are you going to administer the section. For me, the key in looking at s.17(a), (b) and (c) is the harm's test. Is to look and see in what way, if at all, it can create a harm for a private corporate identity. The issue of confidentiality is the biggest red herring, as far as I am concerned, in the s.17 issue, in that, more often than not, it is used to raise the question to protect something that is not confidential. Obviously, it is critical to companies and you have to look at it carefully whether something is confidential information.

Let me give you an example. A consulting firm is trying to get contracts from government. They have a brochure in which they publish their client list, in which they publish the resume of all their staff. They are out pitching it all across Metropolitan Toronto and the hinterlands of this country but heaven help someone applying for that under FOI. All of a sudden, their client list is incredibly confidential. The resumes of their staff is incredibly confidential but you see this document floating around the government, being passed from office to office because they are a consultant firm, looking for contracts. You make your own determination on whether you think that information is confidential or not. So, one of the tests, it seems to me, on confidentiality is the test of reasonableness and where possible, seeing how the company is dealing with that information itself and not all companies treat their client list the same way. Some of them consider it confidential and do not pass it around. Others do. So, I think that is one of the first issues.

The second issue is when to issue third party notice under s.17 and again, that decision in part is predicated on where you come down on the access versus privacy side. It seems to me the first decision is to say, does s.17 apply and yes, Penny, I am one of those civil servants who has to make that tough decision and I agree with what Penny has stated earlier, about how difficult that decision is and it is a key decision and I do not think FOI Coordinators should be making that decision without legal counsel, but that is the first thing to decide. Does this fall under s.17? If it does not, then the Act that you are reading at s.28 in terms of when you are supposed to provide notice, does not apply. If it is a clear case where you think s.17 does not apply.

In my opinion, if in doubt, send out third party notice. It is the safe way to go. It is the way to protect privacy but there are going to be clear cases and I will give a couple of examples where s.17 does not apply and there is an opinion put forward that it should. The other question about when to give notice is when you have gone and gotten the record and you have looked at it. You have no intention of releasing it. It clearly, it meets the requirements of s.17.

Why give third party notice to a company, to waste 21 days, when your client, as an FOI Coordinator is first and foremost the person making the request? That is who you are there to serve. That is why there is a Freedom of Information office to handle people's requests for access to information. It seems to me the prudent way to go is to deny access to the record, save the requestor 21 days for the company to write in and say they object, say no to the record and move it towards the appeal process faster. That serves the client better because you have saved three weeks in getting it into a situation in which the arguments can be made. In terms of the Ministry issuing notice when we know we do not want to give it out, it clearly applies to s.17, the only benefit of that is that it wastes time. Corporate privacy is not in any way affected because the commissioner under s.50 on appeal has to notify affected parties. The individual company whose information we have not given out, will be notified and they will have an opportunity to make representation to the Commissioner. So, you serve your client by getting it into the process faster. You do not compromise privacy.

There is an equally held other point of view and that is that you give third party notice even if you are going to turn it down and you can make your own judgement again, depending on which side you balance on. In terms of how a company treats the information, I think one of the keys in administering the Act is to have flexibility when you are dealing with requests. We have had requests where we have thought that there is no way the company will release it. There is no way and it gradually, when you call people and you find out over time, that there are certain types of information that people are going to say okay and certain types that they are not to and again, you begin to use your judgement. We had a case where we could have sworn all nine companies would have said, 'No way, we don't want this being disclosed.' Five of them wrote back and said no problem; the exact same stuff that the other four swore would kill their corporate privacy and harm their competitive position against the other companies they were competing with. So, I suggest to you that even in the private sector, there are different views on what has proprietary interest, what hurts competitive position. It will be interesting in cases like that to see how these are argued before the Commissioner because you can have the same class of record where some company said no and some company said yes.

One of the things that I have as a personal concern is the application of s.17 to transfer payment agencies. Is the budget of a publicly funded facility, is that protected by s.17? I would submit that it is not. I would submit that the budget of a publicly funded facility, whether it be a hospital, a group home, a school board, any other facility, should be public information. It seems from cases you hear around the government that there is some disagreement on how s.17 applies to these agencies.

Another example would be performance audits of publicly funded facilities. There are public regulations saying how these facilities should be operating. Someone is auditing their performance. There could be a point of view that that information should be disclosed. On the other hand, if a publicly funded transfer payment agency has a report indicating which of their parcels of land they are going to sell off, I would suggest that that should be protected by s.17 because you could argue that s.17(c) would apply, that there would be undue financial loss to them if it was known which sites they were going to sell, under what time frame, or which ones they were going to acquire.

One of the other interesting questions in terms of transfer payment agencies is when you see the argument come forward that if facility "X" knows how much funding I am asking for on this special program, it is going to harm my competitive position because even though we provide the same service to the people of Ontario, there is a competitiveness between facilities trying to branch out and provide new services.

Very quickly because I have been told I have two minutes, I would like to touch on four quick issues. Representations. We find it fascinating that people, when you send out a third party notice, respond no way we want that disclosed. Then you never see a s.17 representation. You call them up and say, 'Look, we need your representation. We agree with you it falls under s.17. Send it, in writing, and give us help in this case when it gets to the hearing process.' You do not see them very often.

The public interest override has been mentioned a couple of times. Take a look at s.23. I do not have time to go through it. Take a look at what was excluded. It applies to everything except Cabinet records, law enforcement, national defence. Personal information s.21, you can override that as well. The same as s.17, go back to the Hansard's transcripts for legislative review and you will find the discussion showed similar concern between s.17 and s.21. That there is a case that the public should override. I suggest, though, strongly that the way we do it in the Ministry of Health is the right way. The only person who can make that decision is the Minister of Health. That is the official in the Ministry who is elected to make public interest decisions.

The last two points I wanted to mention is protection for government. In the appeal process, someone has asked for a company's information, and Penny was touching upon the notice of what they get. One of the problems we have in government is someone asks for Company A's information, they have to defend why it should not be disclosed. This is information that we would never give to Company A if they asked for it themselves. How do they defend themselves when they cannot see this information? On the other side, should the Ministry be required to let them see the information because they have to defend against the request but if they ask for it for itself, we think it is exempt. I think that is an important issue on the company side because how do you defend yourself if you do not have a right to see the information, but ministries should not be forced into a situation of disclosure.

The last comment I simply want to make is to suggest an issue for the future and an issue for the future is subsequent disclosure. There is nothing in this statute or to my knowledge in the other two statutes, Quebec or Federally, that talks about what a requestor can do with this commercial information that has some value to companies once they receive it. I think as cases build up, that is going to be an interesting issue in the future because if they are going to use it to harm these companies, then maybe that should be a consideration that we should be looking at from a public policy point of view.
Thank you very much.

Pierre Trottier

Thank you, Eric. We are running a little bit behind time but we will allow some time for questions and answers briefly before we break for lunch. Are there any questions, please, or comments?

Anne Gray

I find I am getting a lot of requests from commmercial parties for commercial information. It's for competitive reasons, they want to know how the other side is doing, they think that can find something out and I find that the ministries are being put in a real middle -- caught in between these two parties. I have made suggestions that they deal with each other but they want the confidentiality the Act provides or they don't think that they are going to get the cooperation and it will take too long or they will have to give away too much themselves and they're not willing to compromise say, by going outside the freedom of information route. Even within freedom of information, because someone who is making an appeal is not going to go to all the bother of a judicial review, there really is sort of no incentive to compromise, they say, let's talk it all the way through to the end and let the Commissioner decide. I find it's quite often difficult to negotiate within the process. Well, how about if we sever this or sever that or whatever? So, I can't sort of get these two sides to talk and we are left holding the bag in the middle. This question is really addressed to Glenn and Penny. If you put yourself in the position of a requestor, is there anything that, say, the coordinators could do or could suggest to you to bring the sides together, to make suggestions to you that they are willing to work something out, a compromise out?

Penny Bonner

I guess I am a little bit disturbed by your suggestion that a company who is seeking information on its competitor is somehow not a legitimate requestor under the Act and I know that there has always been a concern that the Act will be abused as is alleged, that the FOI has been abused, to seek commercial information. I think that kind of use is certainly not prohibited by the Act and every individual is entitled to request access to information and the whole idea that Eric was raising whatever they are going to do with that information really cannot be part and parcel of it. In terms of seeking a compromise position, I understand that in those circumstances, it will be very difficult. I have certainly acted for corporations who have requested commercial intelligence on their competitors and I think that you are probably left in a situation that there is no compromise that can be reached in most of those cases. But on the other hand, when I am acting for a third party, trying to resist disclosure, I always say assume that the requestor is your worst, your strongest competitor and assume that he is going to take that information and use it to the maximum that he can to harm you. So, in all situations, they're taking the defensive position that they would if they knew indeed it is your worst competitor who is requesting the information.

Glenn Bell

Perhaps just let me add a comment. I have the impression that part of the feeling of discomfort in making this judgment may arise from the lack of expertise in determining whether information, the disclosure of information, will really significantly affect the party's competitive position and I think all I can say is, it is possible to develop such expertise. If you look at the example of the CRTC, the telephone companies are continually supplying information with requests for confidentiality and the CRTC has a process whereby it determines whether or not the specific, direct harm to their competitive position is or is not outweighed by the public interest in disclosure. Over the years, they have acquired the type of expertise they need in order to make that judgment. I think with a little bit of experience and perhaps the seeking of advice from time to time, that kind of expertise can be acquired and you become much more comfortable in making that judgment.

Anne Gray

I just want to clarify a couple of things. One thing is as Eric said, quite often the representations we get from third parties are not very helpful. They're not comprehensive. They don't address the legislation and if the private industry could become more aware of what the requirements are, maybe if we could explain it better, it would probably make it easier. Another thing you mention is lack of expertise. As I said, I have two ministries and many branches and agencies within the ministries and it's very difficult for me to acquire the expertise and I think it's going to take quite a long time to build up sort of almost case law you might say to know what we should do in the circumstances. To address a point that Penny had made, although certainly all requests are treated as legitimate requests, we are, for instance, getting requests from trust companies for annual filings of other trust companies. Now, some institutions like that, financial institutions, already have a data system set up where they share it. But what they're asking us to do is to go searching manually through all these annual filings, copy them, send them out, when they could perhaps arrange through the industry to share it themselves and although I know this isn't supposed to be a factor uner FOI, we don't have the personnel and really the time to want to do this on a consistent basis for everyone and it's very time consuming and if it's a very routine thing, if we decided this is all going to be available, this constant photocopying because it's not all computerized is a real nuisance. Thank you.

Pierre Trottier

Thank you. Commissioner Hansen?

Inger Hansen

Thank you, Mr. Trottier. I would like to address the last point that Mr. Novick made and I may not have fully understood it. If I am correct, did you say that there would be times where a third party would have to defend against the disclosure of information concerning them where that information was not disclosable to the third party? Was that your point?

Eric Novick

That's correct.

Inger Hansen

I have been searching desperately for examples inside my head and I can only come to the conclusion that then it would be exemptible under another section and that therefore there would be no need for third party procedures?

Eric Novick

Correct.

Inger Hansen

In that case, I do not understand what you were saying. Would you mind trying to educate me, either later or here in case others are interested?

Eric Novick

Actually, this is a case that Penny was representing along with our Ministry. So, she could ----

Penny Bonner

And it's pending appeal.....the Commissioner is sitting in audience.....

Eric Novick

So, just to give you an answer, and then in private more detail, if you would like. The question is this. If there is a public body that has to make a decision on certain things affecting private companies and someone has requested access to the minutes of this body, some of the stuff you would not give to one of the companies that got third party notice because, for example, it might affect a court case that you have currently before them in litigation but they have to defend a third party notice and we would not give it to them under solicitor/client privilege or law enforcement.

Inger Hansen

I feel educated. Thank you.

Eric Novick

Thank you. Look for the results.

Pierre Trottier

One further question.

Audience Question (Unidentified)

I'd like to ask the panel what their view is really on the extent of an institution's obligation to identify the third parties that need to be affected. Now, the issue was raised about insufficiency of notice. I'm not talking about whether you notify but how you figure out who are those people who really are entitled to notice. In other words, how far do you have to go and at what point does it become too remote and you say, enough is enough without, on the other hand, jeopardizing the appeal rights of those people who may want to say something and then feel left out later in the process?

Eric Novick

I think when you go through the record page by page, you look for every single company who is mentioned in the record. That is the first step. The second step is, does the record refer to other documents which might subsequently lead someone on a trail to that company and I think beyond those two steps, the only other third one you can make is depend on the program people in the branch in question who know who the normal users are of that information and who, just in seeing even four words that you have left in, might pick up that it is a particular company. I would like to stress again, I think the motto from within the government is err on the side of caution and privacy protection and issue as many notices as you think might be relevant or pertinent.

Pierre Trottier

I would like to say a couple of words about that in terms of the United States experience. What I hear people talking about really is quite relevant in the United States where it has become a rather fundamental issue. Down there, on one side people are saying the government has the expertise to be able to decide what injuries might befall a third party if certain information is released. In other words, sort of "the government knows best" argument. On the other side, the business community is saying it is not easy to tell what is commercially sensitive, even though the government must ultimately make a decision, they can make a better judgement with a business submission and especially when it comes to their marketplace, companies feel that they are closest to that marketplace and the submittors would know more about their competitive environment than anyone else. We have had situations in our Federal Department where, in fact, even commerce officers have told us this is sensitive information and when we check with the corporate people in the company they say, 'Well, no that's not really sensitive.' given certain facts that have been known and similarly, we have had situations where we thought information was highly sensitive and gotten a response back from the corporate president saying, 'Hell, no. My competitors know this already. Give it out.'

Penny Bonner

I guess I would be a little bit concerned about jumping to the conclusion that somebody's interest was too remote and all I can do is suggest that you do what Eric did and I would ask for the sake of all the third parties that are affected that you do what Eric suggested which is give the notice to everybody that is referred to in the record or that is copied on the record if it is a letter or a memo.

Pierre Trottier

I am afraid time is just about up. I would like to thank our panelists for their very thoughtful insights and I want to thank you for being so attentive. Thank you very much.

INFORMATION RESOURCES MANAGEMENT: ADDITIONAL COSTS OR

Terry Campbell, Policy Advisor
Freedom of Information and Privacy Branch
Management Board Secretariat
Toronto, Ontario

I want to welcome you. I am going to be the Moderator for today's panel and the subject for today's panel is the impact of Freedom of Information and Protection of Privacy legislation on the management of information resources and conversely, the impact of management regimes, management programs for information resources, on how you would administer Freedom of Information and Privacy rules. Quite an interesting topic and I think quite a terrific panel.

To my immediate right, we have Christine Macartney, who is the Manager of Information Resources Management for the Ontario Government Ministry of Community and Social Services. Next to her, we have Peter Gillies, who is the Group Chief of Information Practices within the Information Management Division of the Federal Treasury Board, who has the same government as before. We were talking about this yesterday and the impacts of that and I think you will mention that. Beside Peter, is Neil Burk, who is a Senior Consultant with DMR Group, a very well known management consulting firm with some speciality in the area of information management, information technology management. So, that is our panel and we will have quite an interesting session. I said up front that this is quite a fascinating topic. There are a lot of things swirling around in the management world and in information resource management.

On the one hand, you get the view that Freedom of Information and Protection of Privacy lLegislation gives legal clout to what information managers, information resource managers have been saying for years, that the two are in sync, the two are mutually supportive. It gives legal clout to all the business arguments that information managers have made over the years about the need to manage information comprehensively. Managing information is a tangible asset. Similarly, the argument goes that your organization cannot begin to comply with Freedom of Information and Protection of Privacy unless you have a sound knowledge of your information holdings, unless you have management controls in place for your data and information, unless your information practices are documented and rational. So, the one argument goes that the two-information resources management, and freedom of information and privacy are mutually supportive.

On the other hand, you get sort of a counter argument. That is, the argument that the aim of information resources management is efficiency and effectiveness. It's lean and mean decision-making. It is more bang for your buck in data and data systems. The end result of freedom of information, however, is simply more bureaucracy, more rules to follow, more intrusion into program operations. The other argument is IRM aims at efficiency whereas FOI merely puts roadblocks and obstacles in the way.

So, you have some competing views in the information resources management profession. Whatever your viewpoint, I think, both information resources management and freedom of information and protection of privacy are ideas whose time has come. On the one hand, technology is not going to be denied. Technology will drive decision-making. Technology will drive management structures, unquestionably. On the other hand, freedom of information and protection of privacy are here to stay. It is the new environment in which we must manage and in which we must operate. Well, that is the setting for today's panel. I think it presents some conflicts and perhaps conundrums. I hope the panel today can help us sort it out. Our first speaker to my immediate right is Christine Macartney.

As I mentioned, Chris is the Manager of Information Resources Management in the Strategic Systems Development Branch of COMSOC, Ministry of Community and Social Services. Chris and I have had a number of discussions over the years. I saw a presentation that Chris did at an Information Resources Management seminar three or four years ago. I was really impressed. I went back to my home ministry and tried to steal all her ideas. She has been involved, the past three years, in the development of an Information Technology strategic plan for her Ministry. She has been working on database development and strategic data, architectures and data business models. Previously, she was the Manager of Client Services in COMSOC. She has done a lot of work, and has a lot of experience in managing information requests and the distribution of information. So, Christine Macartney, our first speaker.

Christine Macartney, Manager
Information Resource Management Unit
Ontario Ministry of Community and Social Services
Toronto, Ontario

Thank you very much for those kind words, Terry. I should mention, in terms of returning the compliment, that at that same conference, I was very much impressed with Terry. He made a presentation at the time on some work that he was doing in data classification, which was very important then and very innovative at the time, as well, and very worthwhile now. What I would like to do is, first of all, give you a sense of where I would like to take us in this brief discussion today. I would like to talk about the mutual goals, which I do think exist but sort of pose it as a question, to begin with. Between FIPPA and IRM, to compare that in terms of the purpose and objectives of the two areas of interest; go into a little more detail in terms of looking at principles or codes of practice and compare those. I would like to tackle a little bit the data sharing/data-matching issue, which I think is probably the greatest controversy and perhaps, potential conflict between the goals and objectives and then come to some kind of conclusion.

First of all, I should mention to you that you are a bit of a test for this particular overhead. We put it together for another purpose in our Branch but it is probably important to talk a little bit about what information resource management, in the broad sense, really is and basically what we are talking about here is strategic planning at the organizational level. Tying to that, a strategic information technology plan and, as Terry mentioned earlier, taking very seriously both the planning and management of data.

So, for example in our organization, we go through a process of data planning. There is very heavy business analysis, evaluation, acquisition of hardware and software. All of this is what we call being part of the systems development process. A lot of heavy consultations, particularly around definitions and need for data throughout the organization and with our service providers. So, at the end of all of this, and when I say you are a test for this slide, when I was looking at it this morning, I thought "I am not sure that what we intended to do here in terms of talking about a valuable resource called data as the end result", comes across properly in this overhead. I have a sense that it looks a little more like a recycling product that certainly has a lot of common good and I think we may be making some changes; I'm just interested in your reaction. But apart from that, all of the other holds true in terms of what is going on at COMSOC and what is going on in most organizations these days in terms of planning and managing information.

So, I think the question is in terms of the Freedom of Information and Privacy legislation and Information Resource Management, do we have a perfect marriage? Are we headed for divorce in terms of the principles and objectives that are around together at this time or is it a tolerable, supportive relationship and what I would like to propose is that it really is number three, for the following reasons. If we look at the major objectives of both, we see that FIPPA legislation talks about the protection of privacy and openess of other kinds of general information. In terms of Information Resource Management, we have information as a valuable resource, which I think lines up very well, both in terms of the protection of privacy and openess of general information and in order to make it a valuable resource, there are two or three areas that are heavily emphasized in terms of the work we are doing.

We know that we have to have data integrity, a very high level of data integrity, and security of information, and we need to have effective and efficient data design and access to data. If we go on to a more detailed look and compare some of the points in the FIPPA code of practice or that relate to a code of practice, generally speaking, again looking at privacy protection, the IRM principles seem to be very supportive. They emphasize security policies and standards and they are attempting, and I should say in most organizations these days, I think that that is the stage at which they are at, to imbed these things. Quite different from trying to set these up as something that ones does, apart from the other important processes that go on in an organization. The attempt here is to imbed them into those processes.

So, in the case of systems development and various things that go on in an organization in terms of both acquiring technology and planning and managing information, that is the intention here. So, we see that we want to have security policies and standards which relate to technology acquisition. That is usually one of the first steps taken by an organization in terms of improving its technology capabilities. The early stages, as I mentioned a little earlier, are data planning in any organization. So, at that very start, there are security policies and criteria developed for indicating the kind of information or the classification of information. Is it sensitive information and therefore, it falls into a certain category in terms of the protections that have to surround it, etc.

The same holds true of systems development and systems operation and on the other side of the coin, which is freedom of information, the interest there is in having easier and timely access, which is of course supportive of our interest in being able to supply information to the public at large.

Going a little deeper into things, we see that some of the specifics relating to FIPPA and the code of practice, talk about "justify" and "use only related to collection purpose" and in terms of IRM, one of the most important principles is related to what we refer to as functional justification. We are being accused, for example, in our organization of pinning people to the wall in terms of functionally justifying their need for information. It is something that has not been done before to any great degree and as we know, both in our organization and in others, often there is a tremendous supply of information and often, it is not clear the purposes for its use.

The other thing, which may or may not and we will come back to that in terms of data matching area, which may be a conflict but relates to justifying and using information, is a principle related to shared use and what we are saying there, from an IRM perspective, is that rather than creating data 5, or 10, or 15 times for various functions within one organization, we should create it once and share that information and around that, obviously, there is a need for standard definitions. Now, this applies as a general rule to what we would refer to here as general information as opposed to information about individuals.

There is a large question mark and a lot of discussion within our organization, for example, around the protection of that kind of information.

The second issue is the idea of collecting it directly from the source. There is a very similar kind of IRM principle which talks about single source collection. The idea here is that if you collect information from the source directly, you have much higher integrity information in the first place and if you go after it, in terms of a particular set of information from one source of information, it also makes it more efficient. The natural, so-called principle related to the "natural create process", what we are saying there is, if we are asking for information in our organization, it is because there is a business process that supports it, that either creates it or supports it and we should be able to drive that information into the organization as a result of that so-called natural create business process not for information's sake. So, again, it forces the justification of information. It streamlines the kind of information that we collect.

The notification to the subject of the collection purpose was not something that was imbedded in IRM principles but has been added as a result of the FIPPA legislation and it is now part of our security and policy standards. Information must be accurate and thorough. Again, in the code of practice for FIPPA, what we have said and I referred to it earlier on, one of the major IRM principles is high data integrity and ways of achieving that. One of the ways is to have standard definitions for terms, which is again something that is gaining a lot of respect in organizations but is not necessarily there yet and some of the other things that we are interested in doing and we talk about in our strategic plan, are things that we refer to as "red flag" and "trigger mechanism" and the idea there is that people are looking at data, hopefully, that we are collecting information for some purpose in the Ministry which is supported by the information and if there are discrepancies in the data, what we are trying to do is as much as possible in an automated form and in other ways not in an automated form, is to build in things that would trigger or red flag where there seems to be anomalies in terms of the information that was expected to be received and that which is being received. So, there is a lot of work going on to develop the kinds of red flags and trigger mechanisms that should occur and I can give you one example of that. In our ministry, a lot of the funding is through transfer payment and to transfer payment agencies that actually deliver the services and for many reasons, from time to time, they are not too pleased to provide us with information that we think is necessary. So, if we have gone through this exercise of making sure that we have functionally justified, in other words, we are not making a lot of frivolous requests of them, and we do, as an organization feel that we have streamlined the information that we want, we would like to have some assurance that we are getting the information. So, one of the things that is being discussed, now, whether it will actually become imbedded in the practice, I am not sure, but the whole idea that the sending of the cheque, part of that is triggered by the receipt of the information from these transfer payment agencies, which for many reasons, obviously, would encourage the completeness of the information that we need to receive from them.

Last but not least, the code of practice talks about appropriate retention and again, in terms of IRM, which brings into play the whole records management practice that has been around certainly for years and has to do with retention and deletion schedules. So, all of that. So, if one looks at this and sort of beginning to end, we have -- before we create the data, we have a lot of questions and a lot of principles related to functional justification. All the way through the data life cycle to making decisions up front again about retaining it for a specified length of time and making sure we get rid of it when we should get rid of it.

Data matching and data sharing. There are many reasons for and against, I guess. I do not know that I have done credit to the reasons against except that I have probably dealt with them at a very high level here but I think the major concern is the privacy protection erosion. Probably a much expanded and perhaps out of control use that can occur if we start to match, use some kind of universal number or some method of matching data, certainly, if we are not managing it properly. On the other side, and again, obviously, I am thinking of our own organization here, there are reasons why we are interested in at least exploring this issue and it has to do with providing a better service to the clients in the first instance. If we think of elderly persons and our program, we deliver a lot of programs through our ministry for senior citizens as does Health, for example, and at the moment, it is very difficult for them to know what services are offered, and by whom and how to access them and so on and so, there is a school of thought that talks about "one stop shopping", for example, for the elderly and one of the ways of enhancing that is to have shared information about these programs. Often the programs are shared across government organizations and I guess that gets me into the whole issue of where we see government as a whole providing programs or where we are discrete entities as organizations and where we actually draw the line in terms of sharing information or matching information. It is a considerable quandary I think for the government, at the moment.

Another reason is coordination of service. If you look again at, taking as an example the Young Offenders Program, which is shared in government, in the Ontario Government, across three or four ministries and the actual case management or coordination is necessary across a number of ministries, there is very good reason for data sharing there, again on behalf of the client. Individuals who have to provide us with the information, that is clients, often complain about the need to fill out numerous forms with the same kind of information. So, there is also an attempt, through this vehicle, of reducing the amount of redundant information collection that goes on.

From an organizational efficiency point of view, again, we see this as being something that reduces the amount of storage and the cost of that storage. It also, as has been pointed out on a number of occasions, allows organizations to be able to detect fraud easier than they could in the past and the availability of data is also enhanced because you have the principles that I talked about earlier, which is single source data. You are not running around looking for information and as has been said in our organization at times, people spend more time looking for the information than they spend using the information and there is great interest in trying to improve that. In terms of effectiveness, it is felt that having client profiles, whether or not there is a need to personally identify individuals for that purpose is a question, but if they can tie information and characteristics of individuals to some kind of a code, they can get a better profile in terms of planning for the elderly and so forth. Those are the arguments that are put forth in respect to reasons why data matching.

What I have attempted to do here is pose a few questions or share a few questions, which I guess are in my own mind and in the mind of many people who are involved in data planning exercises and in business practices in organizations these days. What about the universal number notion? How do we deal with that? There certainly is a school of thought that says that sort of cradle to grave approach would allow all kinds of wonderful things to happen. We also, though, are very concerned about the wonderful things that might happen that people who either intentionally or in an unwise way, may be able to make use of information.

In our own organization, for example, we feel that the functional justification, really at this point in time, would prevent us from doing that kind of thing. There is no need for it and indeed, our clients are not common across our organization. They are common to us only to the extent that they are provided with a particular program. If they happen to be provided with another program under the umbrella of our ministry, they are a different client as far as we are concerned. They are not known to us as the same client.

Data sharing is and can be seen as something somewhat different than data matching. Data sharing, for example, has to do with a lot of general information and when we talk about that in a statistical way or an aggregate sense, I think we can see that it can be very useful to do so. I guess the third question that I posed here really has to do with how do we ensure that we take advantage of both the technology and the ability to model data and plan data in such a way that it can be appropriately shared without going overboard to the extent that it becomes very intrusive in the lives of all of us? Is there a happy medium solution? I think there is. I thought, by demonstration, I would talk a little bit about some of the data planning or data modelling that is going on in our organization. I am not going to get into a lot of detail here but we have something that we are planning at the moment that we call the Service Provider Inventory and that is simply sort of a list of the agencies and transfer payment agencies that deliver the services.

As well as that, we have all kinds of other data bases and if we just look at the top one, for example, the Young Offenders Database, which is a personal, highly confidential, well protected database on personal information and what we are saying here in terms of linkages is that, in going back to that single source principle, if there is information, for example, in the Young Offenders Database that in an aggregate sense we could use in another database, rather than recreating another set of redundant data, we should do so. So, we are looking at pulling off certain pieces of information from the Young Offenders Database. Nothing that personally ties that information to the individual but for example, will provide us with such information as the age ranges of children, the catchment areas of youngsters and so on and so forth, the kinds of dispositions, etc. So, this is really what we are talking about in the area of data sharing as opposed to data matching.

Some of the possible compromises in terms of dealing with this issue, are first of all, I would say to encourage data sharing of non-personal information, in my opinion, it cannot do anything but good, both in the sense of efficiency and effective program delivery, for example, in government organizations and in others. We should, however, make very sure that we are paying attention to a couple of things. One is to limit and ensure the justification of personal data collection. The best protection is not to collect the information if it is not needed in the first place.

We also, I think, have to, and to the extent that it is there and it is very useful, use the legislation to ensure that usage purposes and practices are well documented, well reviewed and adhered to and that we do not go beyond those bounds in terms of data sharing and data matching. Over and above that, I think we have to deal with each instance on an individual basis and weigh each of them carefully. There are benefits to doing this type of thing properly and I would think that in each case, however, various forms people have to take a very careful look at what they are doing. The overriding concern, I think, should be the best interest of the client or the subject of that information and I guess I have to say that this is certainly my own view but I think it has to override any efficiency or effectiveness measures in terms of the objectives that I listed earlier on.

And finally, I guess my conclusion is that the two initiatives are complementary to each other but more importantly, I think that IRM is a mechanism to achieve freedom of information and protection of privacy. Thank you very much.

Terry Campbell

Thank you very much, Christine. That was very interesting. It was a good, thorough overview of what IRM is and where the match is good with FOI and where there is some rubbing edges. What I think we will do is go through our speakers and leave a fair amount of time at the end for questions. I hope there is a fair amount. You may have noticed in Christine's presentation reference to FIPPA. Since our Act was introduced in 1985, people have been bedeviled with what the proper acronym or short form should be. So, I have just made a little bit of a list here of things that have come up in the last couple of years. We have FIPPA, which always causes me to giggle but FIPPA. We have FOIPOP. We have FOI, just plain FOI. We have FOIA, sounding FOI out. We have the Damn Nuisance -- probably the most -- I would like to say Freedom of Information and Protection of Privacy. It is a big mouthful but you do not sound FIPPA and FOIA. Our next speaker is Mr. Peter Gillies, who is as I mentioned with the Treasury Board Secretariat at the Federal Government.

Peter and I had a chance to have a little chat yesterday and I was amazed and surprised to notice that we have an awful lot of history in common. We both studied history in school. We both went to Queen's University. We both started our working career in an archives. We went into information management and we went into freedom of information. I do not think we are related or anything. Peter, as I say, started his career not with the Archives in Ottawa. He started with the Department of Lands and Forests, now the Ministry of Natural Resources of Ontario. In 1970, he went to the Public Archives of Canada up in Ottawa and worked there. In 1980, he joined the Treasury Board Task Force on developing the Privacy Act and the Access to Information Act and did a lot of policy development there. As I mentioned at the outset, he is now Group Chief of the Information Practices at the Treasury Board and he is very much involved on a daily basis with the Federal Access to Information legislation and the Federal Privacy legislation. So, Peter?

Peter Gillies, Deputy Director
Information Practices Policy
Federal Treasury Board Secretariat
Ottawa, Ontario

Thanks Terry. Inger Hansen, in her talk this morning, mentioned the fact that she did not believe that there would be effective access to information legislation at the federal level until the year 2001. Well, that is the year of the space odyssey. It is also the year of my retirement. So, I may be part of the problem rather than the solution. I would also like to pick up on a theme that really was brought out at the end of the talks this morning in a question. What are bureaucrats supposed to do? We have all these rules and they do not seem to coincide with one another and if you are in a municipality or in the Ontario Government, let me tell you it is no different on the Federal scene. We have just had it a bit longer.

We have basically what I would call a 19th Century system of government with information, the Information Age washing over it and if anything what needs to be done is not to cling on to the old rules but to start developing new rules and that is really, I guess, if I wanted to leave you with anything today, that is really what we have to start talking about and the new rules can be a law, like Freedom of Information and Protection of Privacy. They can be a government approach or policy, how things happen or they can be information technology standards but we have to start thinking in new terms. It is going to be a big cultural change.

I talked to executive groups in the Federal Government in training for the what they call the management category and they have to grapple with it. Perhaps the biggest thing they have to grapple with is that, in actual fact, information now does underwrite virtually everything they do and they have to start thinking about it right at the planning and collection stage and in fact, in my case, access to information and privacy impinges at that point in time and it continues to impinge through to the point of time where it is either disposed or sent off to the Archives and in any life cycle and you turn to any textbook and open up on information management and you get a life cycle approach, that life cycle is fine. I am going to through my own up here on the screen in a minute. It is the only slide I will have on, but you also have to throw into the mix now, dissemination.

You used to think, 'Okay, I've got it down. I'm finished with it. Going to dispose of it and send it off to the Archives or destroy it or whatever.' You also have to think through that life cycle dissemination and there is an excellent example right now in Ottawa where a department, I won't mention which one, has 1400 access requests from one individual. They are after one particular piece of information and they want to sell it. The information is very important. It will have a tremendous market if it is sold. The fact is, that department now admits if it had looked at this information beforehand, five or six years ago, they should have been establishing a database, a sanitized database, that they could have sold, either through the government or some private sector operation and they would not have this problem. The information would be out there. Now, one individual has the possibility of dragging this department to its knees. Once you are locked in an access to information request process, it just goes on and on and on.

The second piece of advice I leave with you -- I'm not denigrating access legislation or privacy legislation, they are both extremely important -- but avoid access to information requests, if you can and avoid it not by hiding under your desks but by getting out in front of it and deciding what information should be made available to the public right off the front. Okay? Enough preaching.

I guess the conundrum of this session about whether information resources management or information management supports, detracts from, or is compatible with, Freedom of Information and Privacy legislation. (By the way, I'll add one. Ours is ATIP not FOIPOP or anything like that. Nice, neat word. We are ATIP.) From 1977 on, we have had the approach at the Federal level that access and privacy legislation is inextricably linked to good information management but it cannot be viewed as a bother to it but rather that it must be dealt with again up front as a part of that life cycle management process. We have remained concerned with information management from creation or collection of the information through its use and dissemination to its disposal or archival retention. This includes the security of the information and the inventory of the information holdings both for management purposes and for accountability to the public.

Our concern is that information creation, use and communication is both efficient and effective. I do not think that access and privacy detracts from that in any way whatsoever. Information must be available when and where it is needed and the available information must be both accurate and relevant so that the system does not get bogged down with extraneous information. Now, the slide I have up here perhaps happens to set out my own life cycle approach but you can change it any way you want but it basically covers the field. The other side you need not, unless you want to get very much tied up with federal authorities, understand what those policies are, but you will see that the access and privacy play a large role there. You will see that there are some other policies. You will see that there are some other Acts. The fact is that at the federal level and there is developing at the provincial level, a corpus of Federal law which again brings its own legislations, which brings its own policies that flow from that and they have to be coordinated. They have to be complementary, and they have to be dealing with the same definitions of information and so forth.

So, to put FOI/privacy off to the side does not work for anyone who is trying to manage in the public sector these days. Access to information and privacy legislation is therefore one component of a system of information resources management. A system which must in turn support broader governmental goals. Some of those are dissemination, which I just talked about. Such legislation can serve to both rationalize and codify information standards of providing a strong base for good, common sense information management.

The result is consistency in information practices across the government, an extremely important thing you find out if you have not already found out. Information exchanges with government bodies and within the government are made easier when everyone knows the rules of the information gained. A beneficial offshoot of access legislation is the requirement for a detailed inventory of all information and an ability to locate any information quickly. Before the legislation came into force, there was little interest in maintaining an accurate accounting of an institution's information holdings, much less where they were located. Things are changing. ATIP legislation demands that informational resources receive the attention they deserve as an important resource. The legally based information management practices will result in better inventories. It will also lead to reduction in paper burden, a little less duplication and regularized retention and disposal standards. There is always, and will always be, a special emphasis on the status of personal information entrusted to government institutions. All of these are effects of the legislation and, I think, have to be seen as benefits rather than as detractions.

The costs of comprehensive inventories and other management tools for information are often associated with ATIP legislation. I do not think that is fair. The costs are much more suitably related to simple, good management processes to which access and privacy requirements are added. The costs which might be legitimately traced to ATIP legislation are those directly associated with providing access to information on request. Direct costs could include the handling of paperwork associated with requests, the search and processing costs and the reproduction costs, some of which are supposed to covered by the fees assessed under the Act or under the Act in Ontario as the Federal Government does not charge for personal information.

Many arguments could be made that the user doesn't really pay the shot. That's a legitimate charge, but ultimately, it must be remembered that this is not expected to be a profit-making venture. The decision has been made that the costs associated with providing public access to information held by government and institutions be balanced between a requestor and the institution.

Another question I would like to raise for your consideration is whether good information managers make good access coordinators and I've swung back and forth on this particular issue. Good information managers always have to have a perspective on the entire information life cycle. They have to anticipate the need for information. How it will be collected, stored, used and disseminated as well as how it will be organized and kept secure throughout the life cycle. Providing public access to the information does not always mesh well with this cycle even though it does not need to be as disruptive as many seem to fear it to be. If information is properly organized and stored, it can be located fairly quickly. If the information has been properly classified for security purposes at the federal level, then it does not need to be difficult to process for release.

A system of security classification, which we have recently introduced within the Federal Government takes the Access to Information Act into consideration, in which you should not be classifying information that you would have to produce for the public. Clearly, there is little point in expending resources to prevent the disclosure of information which would be released under the Access to Information Act. The Act describes the categories of information which are exempted from release. These categories have been useful in determining categories for security classifications.

In addition, the effective dissemination of information can reduce the number of requests received under the Act, as I mentioned at the beginning. Therefore, the role of the information manager and that of the access coordinator are interrelated and I think an effective information manager can make the job of the access coordinator a lot easier, or he can make it a lot more difficult, but I do not think it is necessary that the two roles be combined. They can be. At the federal level, we have seen some successful applications of that. I think if you get in the game of access request in a big way, you are going to have to have a specialist onboard who knows the Acts inside out, is doing the request procedure every day and has a relationship with senior people in the department on a fairly constant basis. That can be, as I said, the information manager but I think in most institutions, it will not be, just because of the nature of the job and the number of fires you are going to have to fight. I guess in conclusion, the title of the conference is, "Key to the 90s". Information resources management, in my view, is no longer a luxury or an option. It is here. It is going to happen. It is vital in order to deal with the growing volume of information, the increased complexity and the increased demands for use of and access to information.

An information management framework is absolutely necessary if we even hope to manage a resource with the capabilities for collection, storage, retrieval and manipulation of information expanding and spreading at an incredible rate. The various information technologies are now becoming even more integrated. It is not enough to manage paper files or EDP systems. We now have to be prepared to deal with information in all its forms and mediums. Information is becoming recognized as a resource and the very nature of that resource has changed. Whereas organizations previously recognized that they could only process or control a certain volume of information, the new technologies have made their capabilities seem almost limitless. With these capabilities, there is a tendency to collect as much information as you can and to jealously hoard it for as long as possible. You are in a public situation. The public is going to want to know what information you have and when you are jealously hoarding a whole lot of it, you are going to draw a whole raft of requests down on your head.

Good information policies must combat these kinds of tendencies. The new information technologies have also made it more difficult to practice or ensure good information practices. Indexing remains a bothersome activity for many and the durability of corporate information is often neglected by managers. Let me tell you, there is nothing more disastrous than saying, 'Well, we should have had something on that response to an access request but can't find it or it sort of just deteriorated and we don't know what to do.' It is not always easy to determine who has had access to what information and how it has been used. Information users can shop around for information they want and its use can be much more difficult to track. If you are dealing with effective privacy legislation and at the federal level we have a Privacy Commissioner with audit powers, that's disastrous for your Deputy Minister or Senior Executive. It is going to be reported to Parliament and they'll look like a fool, if not worse.

In the realm of security, the developing information technologies have again rewritten the rules. There is no longer the comfort of placing documents inside a safe. Information is available in any EDP system. It cannot be considered completely secure. There are only varying degrees of security. Vast amounts of information can now be held in small areas, or on physically small media. Think of the tax information on all Canadians being smuggled out of an office in a shoe box.

Information can be copied, altered or communicated without physically disturbing anything or anyone in the office. Think of the amount of information that can be transmitted over telephone lines in a brief computer-to-computer conversation. The day has passed when security means a big lock on a steel door. Information is a valuable resource. Information that is held by government institutions is a valuable public resource and as such, it must be managed efficiently and effectively and in the public interest. The public interest is defined for most politicians by your FOIA legislation and your Privacy legislation. Access to information and privacy legislation embody a recognition of the public's rights in relation to its information. It is up to public servants now to manage it within the new regime.

Terry Campbell

Thank you very much, Peter. I give my award to ATIP. I like that one best. I very much agree -- I very much like Peter's idea of intentionally and having as a strategy, trying to reduce the number of formal freedom of information requests, again, not by ducking but by thinking through what you make available. The more you can make available, not just in response to a request, but actually having a strategy of distribution, a strategy of getting it out there. Putting it in libraries, putting it community centres, having it on line. Get as much information as you can out there so people do not have to make requests. They do not have to kick in what is a very cumbersome mechanism. The other thing I like very much is not blame freedom of information for what truly are simply costs of doing business, the costs of good management.

FOI is a very easy target because it is new and it is formalized but what it does I think I am echoing Peter here, what it does, is bring into very sharp focus what people should be doing anyways by way of managing information. It's good business practices. Do not blame FOI.

Now, our last speaker is Neil Burk of DMR. Neil has more than 30 years experience in fields as diverse as petroleum exploration and geological research, managing information systems in a national/international context, doing value-for-money auditing and of course, information resources management. Neil helped design a national system for geological data in Canada and then he developed the system to run it for the federal and provincial governments. He is published very, very widely in scientific and technical journals and in information resources management. He has published a book called, "Infomat" which I think is terrific. I think it is just absolutely terrific. There is a plug for you. It walks you through step by step. We are talking about information as a resource, as an asset. Those are just empty words unless you can begin to put a value to information but how the heck do you do that? Neil's book shows you how to do that. Neil is currently a senior consultant with DMR Group and is going to be sharing his expertise with us; Neil?

Dr. Cornelius Burk, Consultant
DMR Group Incorporated
Ottawa, Ontario

As someone else commented this morning, I am overwhelmed to have so many faces and such a large audience to talk about what I suppose most people consider a rather arcane subject information management - but I think it is a symptom of the trends that have been laid before you by the previous speakers. What I would like to do in the next ten minutes or so is leave three messages and amplify a little bit on each of them. In summary, the first message is that, and this is directed at people who are perhaps new to the demands and requirements of the new legislation, but in order to meet these new demands that have been imposed on organizations by such freedom of information and privacy legislation, meeting these demands is an information management issue and what I would like to explore with you in a few minutes are some of the fundamental considerations in that phrase, "an information management issue". What is it and where did it come from?

The program for the meeting emphasized the question of costs and benefits and the message there is that the most cost effective FOI or privacy service is predicated on a corporate information management policy and function. The issue is not costs or benefits. It is costs and benefits and the tradeoffs between them, the balancing act that we heard about this morning. Finally, with this message having been reiterated by the two previous speakers and by myself, that information management is important and it is a fundamental factor, and that there is a call for information resources information management programs, but if you look around in your own organization and organizations in general, there are very few information resource management programs and policies in place and why is this? I would like to run through a few fundamental sources of that problem and some -- and point the direction to some solutions.

Information management, we have heard that phrase many times this morning. It is useful to step back and take a bit of an historical perspective of the last 60 or 70 years and look at the main resource management functions that have evolved. None of them sprang up in a vacuum. All of the functions that we normally associate with resource management, such as personnel management, financial management, material management, they all developed at different points in time in response to social, political or economic conditions. They were a response. The financial management area developed only in the '20s; the personnel management function only in the '30s; the material management during the Second World War and it should be no surprise that with the advent of the enormous powers of computer technology, that the information management function should arise and I would say that that developed as a discipline area about 1977 and I would link it with the work of the U.S. Paperwork Commission who first articulated the information resource management idea.

You should distinguish that from systems management, technology management. What I am talking about is managing in concert, content and media. It is another balancing act. This seems to be the theme of the meeting; balancing. Managing information means not just managing bits and bytes. It does not mean simply an intellectual exercise in developing a classification system but it is actually dealing with both of those areas simultaneously. Information viewed as a resource is a strange idea to many people because they think this term "resource" applies by definition to such things as land, labour and capital and so-called tangible resources but step back and if you want to look up in the dictionary what the meaning of a "resource" is, you will find that it is not by definition any of those things, tangible or intangible.

My favorite definition of a resource is that it is a source of supply, support or aid, especially one held in reserve and it is the context that defines a resource. Just as if you were shipwrecked on the Pacific Ocean in a rubber raft and you had a gallon of water and a pocket knife, those two elements certainly constitute your resource base, even though if you brought a jug of water up here and maybe someone has a pen knife, we would not consider that a vital resource in this context. Clearly, information is a resource in most contexts. Now, it follows from that line of reasoning also that the message is not all information is a resource. Some of it is. A lot of it is waste. A lot of it is just clutter. A lot of it is overhead. A lot of it should be treated the way, historically, we treat all of it. The strategic decision is to identify the real information resources of your organization. So, this discipline area I would say over the last ten years has matured to the point where there are some solutions in sight. There are, for example, a number of professional societies that are tuning themselves to this way of looking at information. There is a fine Masters program at the School of Information Studies at Syracuse University. There are policies coming out of the Treasury Board such as the Management of Government Information Holdings in the Federal Government that reflect this genuine recognition that information is a resource and that appropriate management principles should be applied.

Still, there is a nagging doubt, how can we manage information as a resource? It is also interesting to look at, to answer that question, at the similarities and differences between information and the so-called "tangible resources". There are many similarities but there are many distinctive components and the issue is not to use these distinctive components as an excuse for not managing it. Face up. We have to identify and recognize these properties and deal with them, exploit them and so on. One of the best descriptions of these unique characteristics was published in a book about a year or so ago by Harlan Cleveland, the noted U.S. Administrator, and for example, one of the unique properties of information that has been brought up at this meeting is that dealing with it is not an exchange transaction. It is not like me giving you a car, you having the car and I don't. If we are involved in information, we are always sharing, information management and it involves sharing the resource. It cannot be otherwise. That is the nature of the resource. Information is diffusive and you cannot get away from it. It tends to leak and the more it leaks, the more we have and the lesson there is that your strategy cannot be based on secrecy in any fundamental way because it will leak.

So, I would say that with the evolving development, although it is only ten years old, of the information management profession, that specific issues raised by the Freedom of Information and Privacy legislation can be folded into that world, just as Peter Gillies has emphasized, and that because information is a fundamental resource of virtually every organization, that is a top-level concern and freedom of information and privacy for most organizations, while important, is not the driving force. It is not the reason for the organization's existence.

The second message is just that. An effective solution to the problem raised, from a management point of view, is a corporate information management policy and because you are dealing with resources, you should be expressly dealing with costs and values and costs or benefits, if you like, costs and benefits. The issue is not costs or benefits. There is always a cost. There is always a benefit. The question is, are the two in balance? As we do our strategic planning and our information management planning, we keep those two elements in front of us and make an appropriate balancing judgement.

Certainly, for many organizations who do not have a history or live in a regime involving managing information as a resource or do not have an information management policy, this legislation has certainly served to sensitize the organization to that need but we should not let the FOI tail wag the IRM dog. I think the primary issue is the organization. Within that is information management, within that subset, it's dealing with this particular legislation. So, why don't many organizations have this orientation? I have listed about five basic reasons why, at this present time, a typical organization does not have a corporate information management policy and a supporting program. First and most basically, there may be no leadership. The leadership in question is simply not sensitized to the reality that has been described for you this morning. The solution to that ultimately rests with the Chief Executive Officer and his first act should be to indicate his intention to develop such a corporate IRM policy. It must begin with that level and with that initiative.

A second problem is that although the issue might be generally perceived, there is simply a lack of awareness and education amongst middle managers and senior managers. People do not realize what the impact of the "Information Age" is on doing business now. Doing business in the Information Age is not the same as it was in the Industrial Age. Now, what are those differences? What should we recognize? That kind of analysis has gone on and is widely available in the literature, if you want to look for it. Even with awareness and education, there may be no action in the form of a strategic plan. There may be no knowledge of what the strategic issues are. What should we do first, second, third and so on? There are methodologies and, dare I say it, consulting firms out there are who are willing and able to help in this important area of strategic planning. If you do not have a plan, any road will do and you will continue to wallow in the muck.

Next, once you have a plan, then the issue is do you know what you are dealing with? What are these information resources anyway? Until the last few years, we have not even had a vision of what an information resource looks like much less how do you describe one or count it or cost it or value it and the subject of the book that was mentioned by Woody Horton from Washington and myself, is simply an approach to the very basic notion of how do you identify, classify, inventory information resources? If they are resources, if we accept that as a premise, then it is implied that we must be able to identify and count whatever it is. We must hold people accountable. Resource management, to follow up on the definition, what that means is that if you accept the notion, then it follows that the managers in question have an obligation to seek three objectives with the resources in question, be they people, money, or information and the three objectives of resource management are 1) to minimize the cost of the resource; 2) to maximize the value and 3) to fix accountability for economy, efficiency and effectiveness. Those are the three objectives and that, in the context of information, that raises the whole issue of how do you identify the resources? How do you cost them? How do you value them and therefore, how do you manage them as a resource?

So, those are some of the basic issues. A lack of leadership; a lack of awareness of what is going on; more specifically, a lack of a strategic plan for information management; and lastly, a lack of knowledge of what it is you are supposed to be managing.

I think that overall, Freedom of Information and Protection of Privacy is a very positive element amongst people in the information management arena. It is a part of the business of the organization and conversely, I think people in the freedom of information and privacy world will find solutions to many of their problems in the information management discipline. Thank you.

Terry Campbell

Thank you very much. I want to endorse everything that Neil said very much. It strikes me as eminent common sense in pointing out the three objectives of what every manager should do in managing a resource, whether it is people, whether it is money, whether it is information. Those three objectives, it is easy to lose sight of, and it is clear and simple common sense to keep that in mind, you have your management discipline. We are running a little bit behind the time here, but I think we have a few moments to entertain a few questions. We have a microphone in the middle here. Otherwise, stand up and speak very, very loudly but I think we will have to limit it to just a few questions, okay? Questions! Ann?

Ann Cavoukian, Director of Compliance Office of Ontario's Information and Privacy Commissioner Toronto, Ontario

Terry, just really a comment, a very, very brief comment in regard to Christine's talk, which I enjoyed greatly. All of your talks were very good. Two points to add on the reasons against computer matching in a very broad sense are things like the development of a surveillance society which people object to very much in their society and also the eroding of due process rights which are entrenched in our justice system. The other comment which you were very careful to point out Christine, and I don't know if it was crystallized is that, computer matching or data sharing which is in a sense a subset of computer matching or can be, information sharing of personal information is clearly in contravention of the Act and depending on what you are doing with that information, if it is at a nominative level, then it is something that you should engage in discussion with the Commissioner's office. There are vehicles within the Act that permit the indirect collection of pertinent personal information. So, there are lots of instances where it would be appropriate to engage in that kind of activity but it is in contravention of the Act. For general information, as Christine pointed out, for aggregate type of information, it is a totally different area and it makes a lot of sense, as Christine pointed out, for reasons of efficiency and organization, etc., to engage in that activity.

Terry Campbell

Good thinking. Do you have anything to comment on that?

Christine Macartney

No.

Terry Campbell

Okay, any other questions or comments? We have time for a couple of more. Marc?

Marc Duez Information And Technology Division

I just wanted to comment on the slide of Christine, where she put the data as the output of a process. I think it was a very telling slide in many respects. It conjures up all kinds of ideas of what data was and what place it has in the organization. At least, for these question. It is reasonably easy in a large organization to produce data, whether it is government or any large organization. The fact that you have got data, however, doesn't produce information and both to you and to Peter, and to Neil, what do you think, what sort of idea does that generate in your mind?

Neil Burk

I placed a lot of emphasis on the role of context in defining what is a resource and what is not a resource. Likewise, that is the organizing principle to follow in identifying data, information, knowledge and that whole hierarchy. It is a hierarchy that has only meaning in terms of the context. So, one man's data is another man's information and vice versa. I do not find it a very exciting area to debate because it is so contextually circumscribed. What it means, though, is that organizations must have a firm business model. They must know what combinations of what data equals what information. That information, in turn, if taken out of the organization as in the scenario we are talking about here today, that becomes data for another organization. It is just a piece of data but to your department, it could be the culmination of 15 years work and it is information. So, it is all context.

Terry Campbell

Any further comments? Okay, we have time for one more question and we will break for lunch. One more question, anybody? This is not mandatory. Yes, Ma'am?

Audience Question (Unidentified)

The whole question of developing a corporate IRM strategy is imperative. I think the Ontario Government and the Federal Government have been two aggressive governments who created the Management Board of Canada, then, you have your own Secretariat in the Federal Government, but if you look at some of the other provinces and their governments, the point was brought up this morning that information is power and so who is to develop a corporate-wide, a government-wide sort of strategy beyond the legislation? For example, EDP policy - you find it's often left to the Treasury people, to the people in the Supply and Services Department? Do we need to start thinking of this as something that we have to get together a group of information experts to design such policy?

Terry Campbell

That is a very good question.

Neil Burk

I think the whole process to be successful, has to be driven from the business leaders, from the managers, the assistant deputy ministers, the people who are functionally responsible. What you are alluding to is drawing a distinction between the strategic use of information and its use as a backroom support function and that is what is emerging. There is general recognition, or increasing recognition, that certain components of the information spectrum should be managed strategically. So, the policies and the frameworks for that kind of thing cannot be left to the Finance Department or the programmers in the computer shop. It is a strategic decision. That is the difficult, conceptual hurdle that many managers have to overcome to make that distinction.

Peter Gillies

I would just like to underline that. As someone who is in the midst of developing a central information management policy, if you will, I can sit in my ivory tower and I can write all the rules I want but when it comes to implementation, information management is not something you can take out and ram down people's throats and say in three years, you are going to be here. They have to buy into the process at a very senior level in a department and what we would intend to do, in any implementation we do, is actually sit down, individually. It is a horrendous, from our point of view, resource input but we have to sit down, individually, with each department and say, 'Okay, you're here in the process. Now, there are some overriding, government-wide needs that you've got to meet and you've got to be up here but how are you going to get there? You've got to buy into this process.' And we have to convince them at the senior level to buy in. Otherwise, it is going to be no different than -- I was involved a records management thing and we got compliance at about 15 percent across the government and that was it. That is not good enough and the system for accomplishing it was not good enough.

Terry Campbell

Christine, any comments?

Christine Macartney

I was just going to respond in terms of the Ontario Government. I know at the policy level Management Board has put together what I would consider to be some excellent documents and has attempted to gather together groups of like ministries to deal with some of these policy issues. One of the documents that is particularly useful to organizations that are interested in getting things going is something that Marc Duez has been very instrumental in developing and it is a security program policy effort and he was telling me that that recently has passed a couple of hurdles within the Ontario Government. So, there certainly are attempts and Terry might be speaking about one or two others but at that policy level, there certainly is work going on and attempts to get ministries together and to instigate, if you like, some working together around some of these policy issues.

Terry Campbell

I just want to sum up in response to this lady's question. I think a combination of what everybody says here would say to me that if you want to manage information as a corporate resource as well as factoring FOI in, you have to have a blend of a top-down and a bottom-up approach. Top-down, it has to mesh with the visions and the goals and the mandate of your organization, top down but it has to come bottom-up by way of involvement. You have to have people buy into the process and it meshes somewhere nicely in the middle. Otherwise, you have wonderful policies; no compliance. Otherwise, you have involvement but no direction. It has to mesh and on that very inspirational note, I thank you very much.

KEYNOTE SPEAKER: HONOURABLE MURRAY ELSTON

Frank White, Director
Freedom of Information and Privacy Branch
Management Board Secretariat

I think there is a saying that goes something like good food, good companions and now we have a good speech for you, and that's not me.....that's the keynote speaker that I have the privilege of introducing to you. Our keynote speaker today is the Honourable Murray Elston. Mr. Elston was called to the Bar in 1977 and began practice in William, Ontario. The Minister was first elected to the Ontario Legislature in March, 1981 and he served as Liberal Caucus Critic for both the Ministry of the Solicitor General and the Ministry of the Environment and in 1984, became Chairman of the Standing Committee on Public Accounts, which is the Legislature's watchdog committee on ministries for those of you are not in government. In 1985, Mr. Elston was re-elected and became Minister of Health for the Province of Ontario. He is quite well known, famous and infamous for one piece of legislation that has something to do with health care accessibility and there were a number of demonstrations, I think, on Queen's Park from many people in white but that was successfully passed and extra billing was banned as a result of that legislation.

In November of 1987, Mr. Elston was appointed Chairman of Management Board and he also became Chairmn of Cabinet in September 1987. Later in that year, in November, now here's where you can cheer, he became Minister responsible for Ontario's Freedom of Information and Protection Of Privacy Act. Lastly, not having enough to do as both Minister for Management Board and Freedom of Information and Privacy responsibilities and Chairman of Cabinet, in August of 1988, he was also appointed Minister of Financial Institutions. It is my pleasure to welcome the Honourable Murray Elston.

Hon. Murray Elston, Chairman
The Management Board of Cabinet
Government of Ontario
Toronto, Ontario

Thank you very much, Frank. Ladies and gentlemen, it is my pleasure to be with you and the first order of business is to share with you the location of Wingham, Ontario, which I am sure is first and foremost on everybody's mind. For the purpose of Freedom of Information, it is in Sharon County. I now live in Bruce County, in Brant Township, and that is not far from Wingham and both of them are located not too far from Blueville for all of those who really want to track it down precisely.

For those of you who are wondering, and sometimes I recall sitting out in meetings when the guest speaker gets up, particularly after what turns out to be a relatively long night before the speech and say, 'Gee, I wonder what he's thinking about?'..... I have a slight case of the blues today, like a number of people and for all of us, it has been a remarkable debate over the last few weeks, I think, examining what we intend for the nation of Canada, the implications for social programs and business sector and for moving our society ahead into the 1990's. I think it has been a time when, remarkably, Canadians have turned to really thinking about themselves for a change and thinking, in some ways, positively on both sides of an issue which has become extremely emotional for a number of us. For a person who was raised in the '60s in the University of Western Ontario, that great hotbed of social reform, we have, I think, as Canadians, at least done ourselves proud from the point of view that we really have taken some time, although perhaps to some extent overboard on some occasions on the emotional side, taken some time to think about ourselves and what it is we hope to accomplish over the next few years. From my perspective, as Minister responsible for Freedom of Information, of course, that examination by a society with respect to where it is going and where it has been and the opportunities that are available, could not possibly have been countenanced at all to the extent it was except that there was a sense that there was a provision of material to which there was access. Whether or not people felt they had enough of the information is another question, but I think, in terms of all of us, we were all willing to participate if we had more information in front of us. And so, from my point of view, as a Minister responsible for Freedom of Information and Protection of Privacy in Ontario, we come today looking at that discussion on the Federal scene as a bit of a backdrop. It is a bit of a lesson to us, I think, exactly what it is that we require as participants in the political system, in the social system and in the economic system in this country as we move forward. For many of us, I think, this particular couple of days that you will be participating in, provides us with an opportunity to reach even further ahead and to develop a means by which we can assist the people with whom we work to become better informed and better players in the decision-making process and of course, that is exactly what Freedom of Information and Protection of Privacy is about. Creating the balance between the information that is required to be good participants in the system and rather than just observers from the outside, making uninformed choices.

John Sloan mentioned this morning that there are -- he told me this morning, that there are about 500 people who are registered here that, in fact, this is one of those things where we had to cut off the registration and for me, that is an indication, a genuine indication of interest out in the public, which is pleasing, to say the least. It means that there has been a kindling, I think, of a need to know out of the public because people want to participate in the system. The system, which we, when we came into government in 1985, made a real attempt at igniting because we believe, of course, that those people who wish to play a part must be playing a part in the best informed sense possible.

I am pleased to be here today to talk about a little bit of the things that will be accomplished in the next couple of days. Certainly to talk about what we are doing with Freedom of Information and the Protection of Privacy. I am addressing you, of course, in my capacity as the Minister responsible for Freedom of Information and Protection of Privacy. It is a role that I have had since the Act came into effect in January of this year. I have called the legislation an open window on government and I believe that it is except that I do not suspect that anybody would allow me to draw a curtain from time to time on all of the processes of government. We were talking, for instance, about Kenneth Dye, the Federal Auditor General, requesting the access to certain Cabinet documents, for instance, and as a member of Cabinet, of course, you would like to perform your roles and your duties on the understanding that you can also have access to the information that is required to make decisions without obviously having to hold your Cabinet meetings in a wide open forum so that your discussions can be very precise and, in fact, very specific with respect to what your opportunities are.

That, I think, sets out in many ways one of those delicate balances that you have to strike when you are dealing with Freedom of Information and Protection of Privacy. That delicate balance that is essential to make sure that we are able to perform the duties with which we are provided in a manner which allows us to be responsible in discussing the best possible solutions for the people we represent.

We are often told that we are in an information age but as we are beginning to recognize, mere bits and bytes of information in isolation and out of context can be misconstrued and cause very serious problems.

The Freedom of Information and Protection of Privacy Act is our attempt to strike a meaningful and delicate balance between the right to know and the right to privacy. Both must be respected and honoured in our society. It has been nearly a year since the legislation was enacted and in the first nine months, the government has received almost 2,000 requests for personal information and 1,760 requests for general information contained in government records. Personal records or information requests come in all forms. It might be for an evaluation of a grant application. It might be requests by individuals for access to their personal records contained in Worker's Compensation files, in Family Assistance files or in Employment files.

To this point, individuals have received all information about their personal files in 73% of the cases. There are also further cases where an individual has been provided with a portion of the record or the record that was requested did not exist. In only 2% of the cases was the requested information totally refused and in 96% of all cases, the requestor received a reply in less than 30 days. That is the other side of this Act which is extremely important and that is that there be a timely response to the requests that are made to make it a useful exercise.

I am proud of that response time because it means that one of the concerns that we had, that is that the bureaucratic paperwork and procedural caution would slow down the process, is not generally happening and where we have found that difficulties have arisen, we have taken steps to address those problems.

The other type of records requested under the Act are the records that support the administration and delivery of government programs. This includes policy position papers, minutes of meetings, financial and budget information and procedures and instructions to employees on the delivery of programs.

There is no question that this type of request tends to be complex and can obviously involve large volumes of records that relate to a decision-making process. Consider, for example, a request we received for the complete financial and legal records that related to the decision to extend government financing to Separate Schools. To fulfill that one request involved coordinating the efforts of Management Board of Canada, the Ministry of Education, the Attorney General's office, Treasury and Economics, the Cabinet office, and the Archives of Ontario. For those of you who know how difficult it can be at times to coordinate the actions of several ministries in dealing with complex situations, this effort was trial by fire, proof that the systems we established to administer the program are working well.

Recently we had disposed of information requested on a consultant's report about various aspects of Free Trade and curiously, on the number of hours per day Provincial Court Judges sit on the Bench. Anybody want that information here? We also have a report with respect to remuneration for Provincial Court Judges as well that we are considering at the moment and I suspect that in our considerations, someone might well ask what policy options we deliberated on and perhaps how long we sat around the table deciding about it.

In some cases, we are constrained to only review a part of the records held in our possession and by now you have heard about severing which enables us to remove names and confidential information from a document, so, we can release the remainder of the information. Computer documents can be done with ease. Historic documents that exist only in hard copy take more time. But regardless, this effort is consistent with our efforts to ensure the privacy is guaranteed. Through severing, we have been able to fulfill requests about meetings of the Ontario Hydro Board of Directors and we have been able to report on the number of physicians who were extra-billing by deleting the personal information from the copy given to the requestor.

About 45% of the requests for general records resulted in full disclosure and another 22% resulted in partial disclosure. Only 11 requests were flatly denied. When that happens, when a requestor is not satisfied with "no" for an answer, or when a little bit of information is not enough, we provide an appropriate appeal mechanism. Sidney Linden, who is sitting here at the front of the hall and from whom you will hear tomorrow, the Information and Privacy Commissioner, was appointed by the Legislature and he reports to it. His task is to review decisions when a requestor is not satisfied and his decisions are final and binding. The Commissioner has ordered Ministries to disclose records or parts of records that were originally denied.

Two examples of recent orders to release information were the disclosure of market value property assessment information from Metro Toronto and meat inspection reports from meat-packing facilities in Southwestern Ontario. In another case, an individual's name was requested. That was a case that involved a request for a party's financial and commercial information. The Ministry, according to the third party notification mechanism built into the Act, informed the company that information was being requested about them and that aroused their curiosity. 'Who was asking?', they wanted to know. The Ministry said, 'We can't tell you. Requests that are made to us are made in confidence.' So, the company turned around and invoked the Act as well and they said, 'We want to know who it was that requested the information.' Now, what the Ministry did was disclose the original requestor's request form with the name and the address deleted. That was a bit of assistance because, of course, we now know the request form existed. The third party still was not satisfied with the severed request form they obtained so they appealed the Ministry's decision to the Information and Privacy Commissioner. The result of this rather complex scenario was that the Commissioner ordered the Ministry to disclose the requestor's name.

There have also been instances where the decision of the Commissioner has been to uphold the government decision to refuse to disclose a record. All social Ministries, and the Ministries of Health and Education are repositories of vast quantities of personal information that must be carefully guarded from misuse. Within government, we have to maintain strict confidentiality about Cabinet records and we cannot be a pipeline for one individual seeking personal information about another individual. The notions of personal privacy and the right of access to information are two very different concepts and at times they will conflict.

I was speaking to the two Federal Commissioners here with me at the table and they tell us that from time to time they are able to work things out very well indeed but there is, inevitably, a conflict which can arise which puts them on different parts of the same question, invariably. This balancing act is special to a society such as ours and indeed it is at the core of democracy which makes it all the more difficult sometimes to resolve disputes satisfactorily. If, for instance, you were in a job competition, do you have the right to see evaluation material on other people in the competition? Some might say obviously not but how do you know if the competition is fairly evaluated unless you know the qualifications and evaluations of all the candidates?

Let's take another example. If you were a company about which information is requested, should you have the right to know who wants that information? Some people here are saying yes and some are saying no. There is no simple answer. What it does is kindle a series of other questions. In another instance, if as a corporation, I divulge privileged information to a government agency in compliance with a regulation or because my company is participating in a government program, then would I expect it to be treated as confidential? If it wasn't to be treated as confidential, there is a good chance on many occasions that I would not participate in the program to begin with.

To put it in a graphically different context as songwriter Paul Simon observed, "One man's ceiling is another man's floor." So, too, one person's right to information can be another's invasion of privacy. As you may know, the Act requires the community colleges to be covered on January 1st, 1989 and a year later, all municipalities will be included. With that in mind, I am pleased to see Mr. Bill Hanly down here from the County of Huron who used to take care of the education assessment through county and all those other great things, and Bill, it's nice to see you in from Goderich.

We recognize, as part of extending the jurisdiction of this law to include all municipalities, school boards, police forces, conservation authorities, and other local government agencies, we had first better get our own "act", so to speak, together. So, over the past nine months, my staff have been consulting with local government associations to identify amendments to the Act that would allow it to operate more effectively in a local government environment. We are aware that what works for Queen's Park might not work for the City Council in Windsor, or North Bay or even work in Walkerton or several other places that I can think of.

We have begun the process of a major local government review across Ontario to ensure that the inclusion of local government goes smoothly. All indications are that we will have to make administrative changes in the Act, so, Management Board officials are now working closely with consulting with the Ministry of Municipal Affairs, municipalities and their various boards and agencies to determine what sections of the Act would pose administrative problems so that we can iron out any definitional difficulties.

Many of the people here today are with local government organizations and are here in anticipation of these upcoming changes. Let me assure you that my Ministry staff are in close contact with representatives from your associations and my staff will be working in assisting your representatives in a partnership to prepare over the next two years for the implementation of this very important piece of legislation.

I want to add one more observation that is especially important for those of us in government. This Act creates a spirit of openess for our governments. We are able to work with the public, the press, and the private sector with a freer hand because the legislation gives us all guidelines about the handling and dissemination of government-held information. Where disputes arise, we have an able and independent Commissioner to handle them. This is a delicate balance of a democracy, balancing the right to know with an individual's right to privacy, but no matter how precariously balanced the two seem on occasion, both must be allowed to work together or all our freedoms and individual privacies will be lost.

I want to commend all of you for being here today because it is extremely heartwarming to see the type of interest and expression of genuine concern that these balances be implemented in the best possible fashion. That is the way our government will perform best. That is the way that we can help each other make sure our government remains strong and independent. Thank you very much.

Frank White

First of all I would like to thank the Minister for letting us know where Wingham is. I've wanted to know that for the past few years since he has been Minister........we finally found out. Also I would like to thank the Minister for being extremely informative and also pointing out that even though the Minister has been responsible for this legislation for a full year, he has maintained his sense of humour.

So, we have a half hour before the next session starts. I had mentioned that we would try to provide time to socialize to talk with fellow delegates.

FREEDOM OF INFORMATION ISSUES IN CANADA

Frank White, Director
Freedom of Information and Privacy Branch
Management Board Secretariat

People have asked what FOIPOP means. It's not some new kind of third party secret formula but they are the initials for Ontario's Act. I don't know if I particularly like it but it stands for the Freedom of Information and Protection of Privacy Act and if you have a long title, I guess you get FOI-something but it is the Freedom of Information and Protection of Privacy, which is a long title. It's a lot of words but I guess we are sometimes stuck with acronyms in our society.

It is my pleasure to introduce Mark Zazulak. Mark obtained a Bachelor of Arts and a Bachelor of Law degree from the University of Alberta in 1969 and 1970 and he was called to the Alberta Bar in 1971. In April of 1979, Mark joined the Department of Justice, the Federal Department of Justice in Ottawa and served five years in the Legal Services Unit for the Canada Employment and Immigration Commission and two years in the Legal Services Unit of the Department of National Health and Welfare. In July, 1986, Mark joined the Information Law and Privacy Section at the Department of Justice. He assumed responsibility for that section in July of 1987. If I can welcome Mark Zazulak to the conference.

Mark Zazulak, Senior Policy Advisor
Federal Department of Justice
Ottawa, Ontario

Thank you very much. I was approached some time ago to talk to you briefly about Freedom of Information issues and so I am going to focus on Freedom of Information as opposed to the Privacy Act, which you know at the Federal level is a separate act. Unlike Ontario, we split them. Yours is put into one piece of legislation. Given the parameters, your particular interests today will be with your Ontario legislation, what I hope to be able to do is to share my expertise, particularly with the Access to Information Act and in so doing, identify a number of issues which I think you will find interesting as you become more and more involved with your Ontario legislation.

I plan to look briefly at three particular issues today. Firstly, how to approach exemptions; secondly, public interest disclosure; and thirdly, privacy protection in a freedom of information context. On to the first subject, the exemptions. Both the Federal Act and the Ontario Act confer a right of access on individuals. However, we at the Federal level have been criticized because we have one small section conferring a right and then we have pages and pages and pages of exceptions. Given the number of exemptions which are basically the exceptions to the right of access, it is important that one have a good idea about how to approach exemptions.

As you probably know, exemptions are the counterfoil to access of information. Their purpose is basically to permit information to be withheld rather than to be disclosed. However, in spite of the fact that exemptions run contrary to the very purpose of the legislation in which they exist, you may find that in many instances an institution faced with a request under the Act will spend more time and energy looking for ways to bring information under the protective cover of an exemption than time and effort looking for ways to disclose information to the requestor.

That sort of scenario raises a very basic and fundamental question with respect to freedom of information: is that the right way to approach freedom of information? In my view, the answer to that question is a simple "no". Why? Because I believe that that sort of approach places the wrong focus on the legislation. If, in fact, we view a request as an opportunity to see how much information we protect, we are distorting the role of exemptions and we are distorting the role of the exemptions at the expense of the very purpose of the legislation in which the exemptions are found. In my view, the better approach to dealing with an access to information request can be exemplified by asking the question, 'How much can be disclosed?' rather than, 'How much can be withheld?' Certainly, this sort of an approach would find favour with the Federal Court. It has had an opportunity to provide us with some guidance on the interpretation of the Federal legislation. In a decision by the Federal Court and the Information Commissioner and the Minister of Employment and Immigration, the Court stated,

"The purpose of the Access to Information Act is tocodify the right of access to information held by the government. It was not to codify the government's right of refusal. Access should be the normal course. Exemptions should be exceptional and must be confined to those specifically set out in the statute."

Now, understanding that the purpose of freedom of information legislation is not to codify the government's right to say no is important when you are dealing with questions of interpretation relating to exemptions. You will find that in some cases when you look at an exemption, you will be able to define certain words in the exemptions broadly or narrowly depending on which definition you choose. This possibility, the possibility of a broad and a narrow exemption, creates a doubt about the scope of the exemption.

How do you resolve the doubt? Let me illustrate the point about broad and narrow definitions by referring to s.21 of the Federal Act and s.13 of the Ontario Act. Both of these sections deal with the protection of the government's internal decision-making process. Under the Federal Act, advice or recommendations developed by or for a government institution or a Minister of the Crown may be withheld. Under s.13 of the Ontario Act, the Head of an institution may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by the institution.

Not long after the Federal Act came into force in July, 1983, the Information Law on Privacy Section was asked a question. Just what is advice? We ran to the Shorter Oxford English dictionary, the interpretative bible, at least at the Federal level, to see what guidance we could get from that source. We found two meanings. One was narrow. It would define advice to mean an opinion as to action. We went down a little further in the definition and lo and behold we found something which was broader. It said advice could mean information, notice or news. Well, we had a broad definition of a word in the exemption and we had a narrow definition. Obviously, if we went for the broad definition, the protective umbrella of s.21 would be quite large. If we went for the narrower, it would be less large. What did we do?

Well, we went for the narrow definition. Why did we do that? We did it simply because we were guided by the purpose of the legislation. That is to provide access to information to make information available. We wanted to make sure that that principle was respected. For that reason, we chose a definition which would advance that particular purpose. Now, clearly, that approach was consistent with what the courts later told us about the particular exemption - how to interpret exemptions.

In the very first case in 1984, under the Access to Information Act, the Court had some interesting words about how it viewed the Act and exemptions. In the decision in Maislin Industries, Mr. Justice Jerome stated, *"It should be emphasized however that since the basic principle of the statutes is to codify the right of public access to government information, two things hold. First, that such public access ought not be frustrated by the courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure. Second, the burden of persuasion must rest upon the party resisting disclosure whether, as in this case, it is the private corporation or citizen or in other circumstances, the government."*

To summarize then, the role of exemptions in freedom of information legislation are very much affected by their legislative context. Clearly, when we deal with exemptions, we must see them for what they are. They are, after all, the exception and not the rule and must, therefore, be treated accordingly. Now, this is not to say that we can simply ignore the exemptions. I do believe that they have a role to play. They serve to protect a variety of interests which require protection, be it interests public or private. However, in my view, the spirit of the legislation about which Mr. Elston spoke, will require us to have resort to the exemptions only when they clearly apply, keeping in mind the fact that we should interpret them narrowly and secondly, and perhaps more importantly when you are dealing with discretionary exemptions, only where there is real need to apply the exemption. If one follows that Golden Rule or set of Golden Rules with respect to exemptions, I believe that one will move a long way towards realizing the purpose of freedom of information, which is basically to get information out, not to withhold it.

The next item on which I would like to say a few words here is public interest disclosure. Now, this is a subject which is becoming more and more interesting, which arises more and more often at the federal level. Initially, during the first five years, it was not looked at. It was not subject to a lot of consideration. However, more and more recently, it has become a matter of considerable interest. In large part due to the fact that the Information Commissioner is very concerned that, wherever possible, public interest disclosure be considered.

Now, at the Federal level we have two provisions which deal with public interest disclosure. The first deals with personal information. Under the Act, personal information can be disclosed, in the public interest, where the public interest clearly outweighs the resulting invasion of privacy. We also have a similar provision, which focuses strictly on commercial information. Under the Federal Act, where there is a public interest in public health, public safety or the environment, commercial information can be disclosed but again, only where the public interests clearly outweigh the resulting damage to the business whose information is to be disclosed.

The Ontario Act's approach to public interest disclosure is somewhat different than is the approach in the Federal Act. Under your Act, you have a unique provision, s.11, which requires the Head of an institution to disclose any record where there are,

"reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health, or safety hazard to the public."

The other provision in the Ontario Act which deals with public interest disclosure is s.23. Again, s.23 is unique and what it does is preclude the application of a certain number of exemptions in situations where a compelling public interest in the disclosure clearly outweighs the purpose of the exemption. Now, six exemptions are affected by s.23, those in s.13, s.15, s.17, s.18, s.20 and s.21. Given the number of exemptions affected, it seems to me very likely if you haven't already done so, you will, at some point in the near future, have to sit down and grapple with the question, 'What is in the public interest? What is a public interest? How do we know it? How can we distinguish it from something which is not?'

Now, neither Act defines the term "public interest" and perhaps for those of us who have spent some time working in the area, that is understandable. It may well be impossible. Nonetheless, there are clues right in the legislation which will help anyone working with the legislation to know what is a public interest. I have spoken about Section 20, s.6, of the Federal Act and s.11 of the Ontario Act. That provision identifies three public interests: public health, public safety, protection of the environment. However, the clues that the Acts provide are not always quite that apparent. The Act does not state clearly that such and such is a public interest. In some cases, therefore, we have to dig a little bit. We have to go into the Act and see whether there are any clues. Fortunately, there are.

Both Acts recognize other public interests, albeit, implicitly. For example, if I can refer to s.14 of the Ontario Act. It deals with the protection of information relating to a law enforcement matter. If one looks at the case law on public interest, one will see that law enforcement has been helped by the courts to deal with public interest. If the public interest is to be served, then obviously it is not surprising that we should find an exemption in the Freedom of Information legislation to protect the law enforcement process. Thus, the exemption provided for law enforcement matters in the Act, in fact, is based on a public interest that is law enforcement.

In my experience, the difficulty which most frequently arises is determining whether or not, in any particular case, you have the public interest. From my experience, something which is of interest to the public is not necessarily a public interest. From what I have been able to find out, public interest means something more than mere public curiosity. A review of various legal sources, dictionaries, has indicated to me that if one wanted to define the term, public interest, a definition like the following might work: A public interest is something in which the community at large has an interest. However, if somebody has worked with the legislation, that definition is not terribly helpful. It still leaves you with the basic question, 'What is a public interest?' Fortunately, in most cases, I have been able to find some case law which helped me prepare a bit of a list about what is considered a public interest. Apart from law enforcement, you would find things like national defence, national security, good diplomatic relations and the proper functioning of the public service. The courts have also held that another facet of the public interest is that justice should always be done and should be seen to be done. That too, that expression which is probably very well known to lawyers, is also considered to reflect a public interest with respect to the administration of justice in our country.

However, this list is not exhaustive. You will run across cases where you are dealing with a set of facts which do not neatly fit a mold, where you will have to sit down and make a decision and that is, I think, the real challenge which is going to face you when you have to resolve questions of public interest. My experience suggests that to resolve a question whether or not something is of public interest is made a lot easier if we are able to get all of the facts and that is not always easy and then, have the time to analyze the facts. Again, something which is not always easy because the Acts impose certain deadlines on us. We can't sit back for two or three months and gaze out the window and then suddenly come to a realization that, ah, yes, there is a public interest there. We also have to be somewhat familiar with what has been found in the past to be, public interest. Only by doing that are we going to be able to meet the challenge which will confront us daily when we deal with questions of public interest.

The last item I want to speak briefly about is the whole idea of privacy in freedom of information. Privacy is really based on the concept that nobody has any business knowing. It is based on the idea, the concept of confidentiality. However, when you put privacy into a freedom of information context, you have a bit of a conflict in the sense that the purpose of freedom of information is not to keep quiet, not to keep confidential but rather to make information available. To provide a degree of openness with respect to information held by government. Now, this conflict has to be dealt with in any freedom of information legislation and is dealt with in both the Federal Act and the Ontario Act by a general provision which says that the general principle is that personal information shall not be disclosed. That appears to be the starting point. Certainly it is at the Federal level. The general principle is that to protect the privacy of an individual, personal information about them, shall not be available under the freedom of information legislation.

There are, of course, exceptions. There always are, it seems. Under both Acts, for example, personal information can be disclosed with the consent of the individual to whom the information relates. Although only in the case of Ontario is it necessary that the consenting individual also have an entitlement to access the information himself or herself. That is an important point to note because it has gotten us into difficulty at the Federal level. What has happened at the Federal level is this. Information may not be available to an individual under the Privacy Act for a variety of reasons. They might not have the right to apply or the information might have been exempt had they had a right to apply. In any event, under the Privacy Act, the requestor could not get what he wanted. The requestor then simply provides his or her consent to an individual who makes an application under the Access to Information Act. So, what we are finding is that information which would not be directly available to an individual under the Privacy Act, can in some circumstances be made available indirectly if that individual employs some third party to get the information under the Access to Information Act and provides that individual with their consent. I believe this is also one of the occurrences which happens in the United States with the interplay between the U.S. Privacy Act and the U.S. Freedom of Information Act. However, not all of our exceptions to the general principle of protecting privacy are the same.

There is one very important, very unique provision in the Ontario Act which I think will be a challenge for all of you to apply and that is the provision which permits personal information to be disclosed where the disclosure does not constitute an unjustified invasion of personal privacy. Before I came in, I was looking at a document put out by the Information and Privacy Commissioner's office, a case summary and in fact, it appears that he has already had the matter brought before him and has started to issue some guidance on the issue.

This exemption in the Ontario Act is set out in paragraph 21(1)(f) and it raises, for me, as somebody looking at the Act, a very difficult question. Just what is an unjustified invasion of privacy? Now, the Ontario Act anticipated there would be some difficulty answering that question and so, in s.21(3) the Ontario Act indicates certain types of information whose disclosure could be presumed to result in an unjustified invasion of personal privacy. Section 21(3) lists, for example, medical information, information concerning an individual's financial position or information on an individual's political beliefs.

However, as the case I was reading in the Information and Privacy Commissioner's case summaries indicates, you are going to find cases where you are dealing with information which is not listed in s.21(3) and so you are going to have to fall back then to the guidance provided in s.21(2). Now, s.21(2) tells us that when determining whether or not there would be an unjustified invasion of privacy, we are required to look at all relevant circumstances.

The Act, fortunately, provides us with some clues as to what is a relevant circumstance. For example, one could look at the nature of the information itself. Is the information whose disclosure is sought "highly sensitive" or is it "unlikely to be accurate or reliable"? One could also look at the impact the disclosure would have. Would the disclosure promote public health and safety or "unfairly damage the reputation of any person referred to in the record"?

Even with this guidance, even with the direction which is provided in subsection 21(2), some difficult questions remain. What is "sensitive information"? Surely, there is a large degree of subjectivity in a determination of sensitivity. How does one determine whether damage to an individual's reputation is fair or not? I do not have the answers to those questions. They are extremely troubling but they are going to be questions which you deal with and resolve. In my view, this particular aspect of the privacy protection afforded in the Access to Information legislation you have is going to be very challenging. At stake, is the privacy of individuals whose personal information may be disclosed.

Now, clearly, on the face of the Ontario Act, it is recognized that the right to privacy is not an absolute right. What the Act leaves to those of us who work with the legislation is this: how far is it permissible to go when one invades an individual's privacy? What extent of invasion of privacy is permissible? That is not going to be an easy question to resolve.

By way of conclusion, I would like to suggest that freedom of information and privacy legislation is going to have a key role to play in the 90s. What remains to be determined is whether the role of this legislation will be fully realized. Full realization, depends in a very important way on how we approach the legislation and how we respond to the legislation or the challenges which the legislation creates for us. My experience suggests that the challenges are very real nor will they be easy to meet. Nonetheless, in my view, the principles which underlay this legislation are so very important to us that the challenges which arise from the legislation deserve to be met with our very best efforts. Thank you.

Frank White, Director
Ontario's Freedom of Information and Privacy Branch

Thank you. That was really an excellent analysis of some of the issues that we are dealing with every day and I would like to say for the Ministry and agency coordinators who are here, and also from the Federal Government, the Access Coordinators, I think it shows very vividly some of the responsibility that we have in determining and through our interpretation what is appropriate and what is not appropriate with this type of legislation and they're very difficult decisions to make, very difficult in many cases. Thank you. We have two sessions next. One will be in this room, local government, and the other will be straight across in the Elizabeth room, on the media. It is a difficult choice. They're both really excellent panels but now is the time to make your choice and we will begin almost immediately.

THE FREEDOM OF INFORMATION ACT: DOES IT WORK FOR JOURNALISTS?

David Grossman
Communications Advisor
Management Board Secretariat
Toronto, Ontario

My name is David Grossman and I am the Communications Advisor for Management Board Secretariat with the Government of Ontario. And a journalist as well, I wanted you to know that. It is a distinct pleasure to be the Moderator for this afternoon's session and it is kind of rare, and I should tell you, that we have you people actually recording the media. This session will be recorded. It should be an interesting session. Unfortunately we have an hour. These are the kind of sessions that tend to go on and on and my job as the Moderator is to keep it within time so you people have an opportunity to hear the last plenary of the day.

The format is basically quite different. What we want to do here is talk about the subject and then give you people ample opportunity to raise your concerns and questions about the media and the subject. Before I introduce the panel, I would like to ask that when the opportunity is there for you to raise questions, you please identify yourself and either the ministry or the agency or whatever you represent. That is just so that we at the front know who you are as well.

I will introduce our panelists from my far right or from your left. Hank Daniszewski is the Regional Reporter for the Windsor Star, specifically covering the area of Essex. He specializes in educational and municipal councils. As far as FOI, he has had three requests in and he has heard from them all. He has been a journalist for the past nine years and full time since 1978. He started with the Brandon, Manitoba Sun and then moved over to the Windsor Star. It will be four years this week, Hank, that you are celebrating your anniversary with that paper? He is also a member of the Ontario Reporters Association and has won awards for reporting, specializing in agricultural writing.

Beside Hank is John Minor. John is a Business Reporter with the London Free Press. He has dealt with the Federal Access Act or law quite significantly. As a matter of fact, 80 requests in the past five years. That is 8-0. He has been a reporter for a number of years as well, working with various weekly papers, the Regina Leader Post and the last two years in London. He is an award winning journalist, specifically in 1977, I think, is that correct, John, for some work on investigating and research. He is also the President of the Ontario Reporters Association.

Beside John is Matt Maychak and a special word here, Matt. I do not mean to embarrass you, Matt, but Matt is filling in for William Walker. Way back when we put this panel together, Bill had consented to join us but there was another person in Ottawa that decided to call an election. As a result, Bill unfortunately could not be with us today and on short notice, Matt was more than willing to fill in and thank you very much for that. Matt has been with the Star's Queen's Park Bureau for the past few years. He is a graduate of the School of Journalism at Carleton. He's been with the Star for a total of eight years, as the General Assignment Reporter, Prairies Correspondent and as I mentioned, with the Queen's

Park Bureau. He has had a rare opportunity as well to use FOI in this past year since it has become legislation in Ontario.

Closest to me, on your far right, is Gerry McAuliffe. Gerry rounds out our panel of four male reporters. Sorry ladies, we tried. That is all I can say to you. It has happened to me before but I was turned down by five women when I asked them to join us. Gerry is with CBC radio in Toronto. He has been a reporter for the past thirty years, ever since he was four years old. Is that right, Gerry? He has won an ACTRA award and has worked with the Globe and Mail, the Hamilton Spectator and currently is with the Press Gallery in Toronto at Queen's Park. Ladies and gentlemen, that is your panel for this afternoon.

The subject is the Freedom of Information Act: Does It Work For Journalists? The format calls for our panel to make a brief comment of about five minutes relating to subject. In the event that one of them disagrees with another, they will have a chance for quick comment or rebuttal and then the floor is yours. We encourage you, we want you to ask questions. We promise you they will not appear in the paper tomorrow. They will not be recorded on radio. We will conclude with the members of the panel having a short comment. Hopefully, that will all take an hour and that will lead us into the next afternoon session. So, we will start off first of all with you, Hank.

Hank Daniszewski
Regional News Reporter
The Windsor Star
Windsor, Ontario

As Dave mentioned, I cover education and municipal politics in Essex County. I cover four suburban municipalities surrounding Windsor, ranging in size from 4,000 to 14,000 and two rural school boards, public and separate, and the Essex Region Conservation Authority. All sorts of things I cover, PTRs, mill rates, drainage and all sorts of sexy issues like that. The topic is, "Is FOI Working For Journalists?" and I would say for this journalist, anyway, it is not. At least not so far.

When the Act was brought in, I was hoping that it would help me dig out some information from my agencies since we are all closely tied to the Provincial Government. Then, to my dismay, I found out that a number of them, in fact all of them that I deal with, are exempted until 1991. Then, I thought perhaps I could indirectly find some information by filing to the Provincial Government for things they had on Tecumseh and St. Clair Beach, these areas. So, what I did soon after the Act was proclaimed. First, I filed a couple of requests. Now, I do not have a problem with my municipalities or the Conservation Authorities simply because their meetings are open. I get along well with the reeves and mayors and if I want something, I just ask for it and most of the time, I get it. So, there is no reason to use the FOI Act and that is true of a lot of reporters on a lot of beats. It simply is not necessary.

My school boards are another question. They have a long standing tradition of secrecy; of whatever the opposite of democracy is. There is very little public interest. Most of the trustees are acclaimed, term after term. Few people attend the board meetings which is pointless anyway because most of the decisions are made in committee meetings where no one attends, including myself. So, I attempted to get information on two schools in the area, in regards to full funding. I filed and I received a prompt reply, telling me that the information would cost me $102.00 in one case and $79.00 in the other. Well, I thought that was a bit pricey. The paper I work for - it is not a big problem. They were willing to pay it. If I worked for a smaller paper, I suspect they would not because there are not too many city editors, especially these days, who are willing to pay $100.00 for information when it may not lead to a story. Anyway, I paid the money and the fee was actually reduced, I must say, by the time that it finally got in. They cut the fee for some reason. I guess they figured it was not as expensive as they thought and the information I received was somewhat useful. It confirmed a lot of things I already knew and that was helpful but it was not really anything I could do much with, make a story out of. So, I figured, well, it was a good try.

A few months later, I tried again. One of the documents that is considered secret by my school boards is their budget, which amounts to about $50 or $60 million a year. They release a ten page budget summary and that is it. It is very broad and I applied to get all the goods on their budgets, whatever the Ministry of Education had. Paid about $50.00 for that and when it came back, it was really disappointing. I do not know if you have seen the documents used by the Ministry but it looks like pages and pages of trigonometry equations. They are funding formulas and they just go on and on with all sorts of weird calculations that I am sure only a handful of people understand. So, that was really quite frustrating, quite discouraging.

Now, I suppose when 1991 rolls around and my agencies come under the Act, it may be better but I am skeptical and I just learned from experience that if an agency does not want to cooperate, it can find all sorts of creative ways to get around the law. It can hold secret meetings. It can deny that documents exist or it simply will not write things down. It can have all sorts of meetings, do all sorts of things and the result of which is a one page memo, or a single line in a contract or something. You have no idea, as a journalist, what went into that. The Education Act, for example, is abrogated all the time. The way it reads is that a board cannot close any meeting, even a committee of the whole unless there are very specific exceptions, dealing with litigation, contracts, things like that. My boards routinely abuse that part of the Education Act. I was thrown out of one meeting where the board passed an illegal $1.5 million deficit. That was its decision. I protested and they said the reason they threw me out is that the Act allows them to throw me out if it is litigation and since they were breaking the law, that is litigation and they can throw me out. So, I guess if you do anything illegal, you can throw a reporter out.

I am just skeptical that when the time comes, they will look at the Act and the first thing they will start to do is figure out ways around it. So, I guess my message is to the ministries that I would hope that the government would not only legislate but would show some leadership in making the agencies that come under this Act cooperate, not just to the letter of the law but also to the spirit of the law and I think that is going to be a tough fight. A lot of these agencies, especially in the rural area I am afraid, are not used to public scrutiny. They resent it and I think they will not cooperate. Thank you.

David Grossman

John.

John Minor, Staff Writer
The Free Press
London, Ontario

The Freedom of Information Act: Does It Work For Journalists? I think the simple answer is, rarely. Part of the problem rests with the Freedom of Information Act itself. The blame must also be shared by civil servants and the media. One of the main reasons journalists will shun the Act at this stage is the time delays in legislation. Most news stories tend to have a very brief shelf life. They simply will not survive the 30 day notification period contained in the legislation, let alone any extensions that may be granted. The Act is of now value to broadcast reporters looking for a 20 second clip or print reporters working to daily deadlines and even if a reporter could talk his editor into giving him or her a month to work on a story, it would still rarely be of any use.

If a reporter is forced to appeal a decision, the delays are even more substantial. I am the proud owner of Appeal Number 880030, filed March 6th, 1988. I have yet to hear the final outcome. At the Federal level, I have some appeals that are now about 14 months old and I am yet to receive a preliminary report on them. Another major problem with the Act is cost. I found that the Ontario Act to be much more expensive to use than the Federal one. For example, a copy of a contract with Cami Automotive, that is the giant GM/Suzuki plant under construction near Ingersoll was forwarded to me from the Federal Government, free of charge. The Provincial agreement, which was the same basic number of pages, cost me $59.60. The average cost of my requests at the Provincial level have been upwards of $80.00 with one costing more than $200.00.

That may not seem like a lot of money to some but it is beyond the range of most newsrooms in this province, particularly weeklies and small dailies. Although I worked for one of the larger papers in Ontario, most editors there will still hesitate to approve an expenditure there of more than $100.00 without knowing what they will get in return. Of course, the problem, as a reporter, is that you do not know what the answer is until you receive the material. It is sort of a chicken and egg situation. The problem of cost is compounded by the belt-tightening in the newspaper industry at this time. While the industry is recording record profits, major news organizations are currently pursuing even higher returns by reducing costs, including the costs of gathering news.

Another impediment for journalists in using the Act is lack of results. The Act is riddled with exemptions, allowing bureaucrats to withhold almost anything and some will grasp at any excuse to block the release of information. Let me give you an example. As I mentioned, I applied earlier this year to the Ministry of Industry, Trade and Technology for a copy of the contract between General Motors/ Suzuki and the Ontario Government. I recognize that such a request is complex because it does involve third party information. What I got back in the first round was a heavily edited version of the contract with about two thirds of the material blocked out. I appealed to the Freedom of Information Commissioner and subsequently, the Minister released 18 pages of additional material, most of it useless. What was interesting were two portions originally denied under s.17(1)(c),

"This section requires a government head to refuse to disclose information that could reasonably be expected to result in undue loss or gain to any person, group, committee, financial institution or agency."

What were these offending sections? I will read them to you:

"Information, financial and otherwise provided pursuant to this agreement by Cami, GM Canada/Suzuki to Ontario is to the best of their knowledge true and correct in all material respects."

The second portion that was exempted under this was,

"The forecast and other information provided by Cami, GM Canada/Suzuki to Ontario in support of requests for financial and other assistance from Ontario in connection with construction and operation facility were made in good faith."

Perhaps I am a little naive but I still fail to see how there could be undue financial loss or gain if the word leaked out that GM or Cami were making true statements and they were making them in good faith.

Thankfully, the Act is not applied with the same consistency. I found civil servants at both the Federal and Provincial level that do attempt to apply the spirit of the legislation. From my experience, I would have to say that Ontario Hydro's information people fall into that category. I filed three requests with the Crown Corporation and instead of following the usual pattern of waiting until the last possible day before they responded, Hydro handled the request properly and went beyond the legal requirements of releasing information.

One request was regarding a law suit involving Ontario Hydro and Petrosar in Sarnia. In the first round, Hydro had won a $25.5 million settlement from Petrosar in 1986. This was appealed. About three days before the suit went before the Ontario Court of Appeal in September, 1987, Hydro settled out of court for $150 million. That kind of piqued my interest and I requested all background reports and correspondence in the law suit. Ontario Hydro officials went further than that, giving me the legal opinions they received. Something they could have withheld under the legislation. Unfortunately, my experience with Ontario Hydro has been the exception, not the rule. Thank you.

Matt Maychak, Staff Writer
Queen's Park Bureau
The Toronto Star
Toronto, Ontario

I am happy to be here to talk about anything that does not start with "free" and end with "trade" but beyond that, my knowledge of the Act, I have to confess, is a little limited. William Walker really is our expert on this piece of legislation and I am a little intimidated sitting beside someone who has been in the business 30 years and someone who has won awards and put in 80 requests because I have been alive for 30 years and have not won an award yet. I am going to do what journalists always do and that is cop out a little bit. What I did, feeling I did not have all the answers was ask the questions and I went around to my colleagues in the Press Gallery at Queen's Park, the people who cover government on a full-time basis and asked them what they thought of the Act and how useful it was to them and I think in a nutshell, they perceive the Freedom of Information Act the way you may perceive the emergency brake on your car. You are glad it is there but you do not use it very much and that is the gist of it.

I spoke to eight or nine fellow reporters and I would say among print reporters of the two or three that I spoke to, as well as those three in my office, we all use it occasionally. One print reporter had never used it and ironically, he was the most supportive of the legislation and among television and radio reporters, they tell me they have never used it. I would like to tell you some of the things they said to give you some flavour of why.

TV reporters said to me, 'It is very much day-to-day what I do. My bosses don't allow the time to wait six or 12 weeks or whatever.' A radio reporter said, 'I do more news as it happens, spot news. I do some feature stories but more as an expression of what is happening.' He said, 'The words sound great. Freedom of Information but I can't think of an example where I'd use it.' One print reporter said, 'Personally, I haven't been in a situation where I was blocked, where I needed to get information that way but perhaps that means some of us don't ask enough questions because eventually in government we probably will get blocked if we ask enough questions.' but he said, 'Knowing the process is available is reassuring and healthy.' I asked him what the best thing about it was and a print reporter who has used it fairly extensively said, 'The best thing about it is that eventually you get a pile of information.' but the emphasis was on the word "eventually".

The TV reporter again said the worst thing was the time factor. 'Most people working at Queen's Park are one-person bureaus, trying to keep tabs on the entire government. They are so busy with what happens in Question Period and the day-to-day events that they don't think beyond that and that may be a good or a bad thing but most of them feel that's the reality they face each day.' He said, 'Sometimes, he who waits is lost in this business.' And the worst thing they listed about it, those who had used it, was the long delays in getting information and the roadblocks they ran into.

A Globe and Mail reporter said to me, 'The worst thing is you have to get through a lot of soot to get the stuff.' and if you believe he said "soot", then I can sell you some things later on. He said, 'There's cost; there's a delay' and he said, 'Some bureaucrats have used the privacy provisions to make it tougher to get information.' He used for an example, Mr. Petersen purchased a house recently and he wanted information that had always been available at the local registry office on that purchase and when he went to get it they said, 'No, because we passed the Freedom of Information Act, you can't have that any more.' He appealed and was able to get it. That is an example of people using it for the reverse of what its intent is supposed to be. So, also there is no common procedure for ministries. He gets different rules for different ministries and, as well, he found a difference in the cost. Not unlike the other experiences you have heard about here, this reporter went to Freedom of Information to get some documents -- he actually wanted a report on the impact of Free Trade on Ontario and he was told it would cost $200.00 and when they protested, they were told, 'Okay, it will cost $15.00.' He went out and tried the same tactic buying a car later that afternoon but it made him think that that was a very arbitrary approach. It made him question whether there really were any rules for the cost involved.

The main question being, is it a help to you in your job? In the consensus, print reporters said, 'I guess I would have to say yes because eventually we get what we want or we get some of what we want.' But the TV or radio reporters said they do not even use it. They cannot even remember, most of them, following up on a story that appeared in the paper that was generated by an FOI request. Basically, to sum it up, I asked them to rate it on a scale of 0 to 5. Most print reporters gave it about a two (2) because they said sooner or later we get some information but radio and TV reporters said minus one (-1) because it is just not "part of our lives".

The funny thing was most of them said, 'I really think it's great to have it. I think it's good for democracy. I'm glad it's there. I'm sure we'll use it eventually.' But the bottom line is, they are not using it. So, either -- it may raise some discussion later whether that points out flaws in the FOI or flaws among us but that is something you may look at later.

Gerry McAuliffe, Bureau Chief
Queen's Park, CBC Radio News
Toronto, Ontario

I can never figure out for the life of me why David Petersen introduced the Freedom of Information Act, until today. It is obvious from the size of the crowd here, it has been the most successful government "make work" project created in this province in the last 25 years. I was quite amused by Murray Elston's speech at noon. He described the Act as an "open window" on government. An Act which creates a spirit of openness. I would love to meet his speech writer. He should be sitting in the corner with his face to the wall.

The term, 'Freedom of Information Act' is really a complete misnomer. What it really is and truthfully is, is an Act to protect the government from the invasion of the government's privacy by the taxpayers and the press. What it is really, is a negative bill. It tells you what you cannot have; not what you can have. There is nothing free about it. They can soak the butt off you if you so choose. It is a bill that allows civil servants to screw the public around as much as they want and as often as they want. They can use it not to give you information but to delay giving you information. It is open to all kinds of abuse.

Let me give you one or two examples. I interviewed the Head of one major Provincial Commission two or three months ago and in the process of that interview, asked him for the job description and the salary range of one of the people serving under him. He refused to give it to me. What that did, of course, was force me to apply for it under the Freedom of Information Act. I made the application, put it in the government's internal mail system at Queen's Park and they said it took them two weeks to get it and then at the end of the 30 days, they did not have the information, they called me and told me it would be a week later in coming. So, to get the job description and the salary range of a specific position within the government, it took me close to eight weeks to get the information, something that should have been quite easily obtainable by telephone.

The Act is full of exemptions, exemptions and exemptions. What it should really list is what you are entitled to and the penalty provisions should include some sort of penalty for those who screw the system around. When you read the Act, the penalty provisions only kick in when you try screwing around the Freedom of Information Commissioner, you see. So, you can screw the public around all you want. It is only if they get determined and insist that they eventually take their question up through the system that the penalty provisions kick in. In fairness, it is too early really to fully assess the impact of the legislation. Primarily because it only came into force in January and this is ten months later. My guess is it will take three to five years before anybody can make any kind of informed, detailed critique of whether or not it is really going to work but it is pretty obvious to people like myself that it is an Act more intended to protect the government than it is to provide the public with any large degree of information.

I would like to close with two points. Number one, why do we even need a Freedom of Information law in Ontario? After all, the government is a massive, bureaucratic organization that is totally funded by taxpayers. Why shouldn't they have a right to most of the information that is in the possession of the government to begin with? Second, and I have to close with a bit of egg on my face, and tell you that whatever flaws exist in the Bill, the news agencies in this Province are as much responsible for it as anybody. When the Bill was before the Committee, not a single news organization appeared before the Committee to raise one iota of concern about the exclusions contained in the Bill or any other weaknesses.

David Grossman

Thank you, panel. Well, ladies and gentlemen, you have heard introductory comments from members of our panel. Gentlemen, do you have a comment to make amongst each other? You want to wait and hear what the questions are first?

Hank Daniszewski

Why don't we open up to these people who paid to come here?

David Grossman

Okay, good idea. We have a microphone in the middle. We ask you again, please, to state your name and who you represent and speak clearly into this microphone. You can address your question to either member of the panel or the whole panel.

Charmaion Chaplin
Communication Security Establishment
Ottawa, Ontario

I want to speak to the last gentleman who spoke, Gerry McAuliffe. My entire experience with Freedom of Information or Access to Information is right at the other level, plane of resistance. It is for historical military documents and your comment about the law being designed to protect the government and that it should be written to describe what may be released instead of that which may not be released. I would like to point out that law like that is much more limiting. Military records describe just about everything human beings do from buying mortar heads to setting up day care centres and the exemptions are very specific and anything which is not specifically described by an exemption has to go out and that is that. If the law were written the other way up, it would be much more limiting. Before access to information and privacy, the onus was on the Declassifier, there was no such thing as an Access Officer in those days, to justify release of a document. Today, we have to justify not releasing a document.

Gerry McAuliffe

You want me to respond to that, obviously. I will have to start by telling you I have no experience with the Federal Statute at all because I have not used it but in response to your question, I still raise the question, 'Why do we need a Freedom of Information Act to begin with?' I mean, if information is going to be released -- if you are going to lay down exclusions, then surely there are vast areas where you should be laying down what it is people are entitled to.

Charmaion Chaplin

Everything else, Mr. McAuliffe. Read the Act.

Gerry McAuliffe

I raise a point because this is the stuff that is thrown back at me when we phone looking for stuff. "I've got to check first if there's an exclusion on it."

Connie Mahaffy, Coordinator Freedom of Information and Privacy Ontario's Ministry of Correctional Services

Just a couple of comments. First, I would like to encourage reporters generally that when they do receive documents under the Freedom of Information and Protection of Privacy Act, that they do include that in their report, whether it is on the radio or in the print media so that the public is aware that the information they did receive, was received vis-a-vis the Freedom of Information legislation. I think that is an important vehicle in terms of educating the public and that has been done in some cases but not in all cases. A second comment, Mr. McAuliffe mentioned that he had contacted the Head of an institution and, no disrespect to heads of institutions, but they have, as you know, many responsibilities and quite often, you might or at least again, I would encourage you to contact the coordinators in the first instance because often we have a more hands-on, day-to-day, working knowledge of the Act and if you phone and ask for a job description or a range, a salary range or something like that, you are not going to be met with some of the bureaucratic tape you might be met with if you deal with an individual who, day-to-day, is not dealing with the Act in an operational sense. Finally, I would just like to mention that of course, we talk about the Freedom of Information Act but in Ontario, that is only half of the Act and we also have protection of privacy provisions in the legislation and I know privacy is not something that is dear to the heart of journalists but on the other hand, I would like to ask you, you cannot deal with half of the Act. You have to deal with both because we have to deal with them and we have to reconcile one with the other. So, as journalists, I guess I am just interested. Do you have any sense of the right to privacy with respect to personal information, and I am not deliberately being facetious or anything, but this is not an FOI act in and of itself. Okay? This is a dual act with different vested interests and one of the very serious ones is protection of privacy. So, I ask how you, in your day-to-day work, attempt to reconcile that. We have to reconcile it legislatively, every day. How do you try to reconcile it or is it an issue at all for you in terms of your modus operandi?

David Grossman

Panel, who wants that?

Gerry McAuliffe

Well, it is -- there are a couple of matters to respond to. Number one before we get to the right to privacy thing, I think it is important to point out that reporters should not have to go to the Freedom of Information coordinators when they are pursuing most information. I mean, if you are doing an interview with somebody who is a senior official of a department, they have the authority. If anybody should be aware of the provisions of the Act, it should be them to begin with, but secondly, on the privacy matter, I think most journalists are aware of the necessity in a number of instances for privacy. I would say that in my experience as a reporter, that it probably does not arise any more than maybe two or three times a year. Most information that we pursue is of an extremely general nature. Does somebody else have a view on this?

Matt Maychak

It is hard to answer that in theoretical terms - a hypothetical question. You can tell I talk to politicians all the time! I think it is fair to say that many of us would maybe have in the back of our minds two sets of rules: those for people who are not used to dealing with the media or who are in private life, someone involved, say, in a car accident perhaps, and those that are involved in the public payroll. I would think that many of the documents sought here involve people, like in John's case, where he is trying to get information on a contract, when a private industry is seeking information or is seeking money, our money from the government.

So, I think we may be a little more aggressive in going after government information and a little less concerned about privacy when we are seeking information about decisions or people that involve the public purse.

Hank Daniszewski

I just want to make one comment about the inclusion of the FOI Act in a story. I think it is a bit of a commercial for the government and a bit of puffery from the reporter who does that sort of thing, saying, 'I'm an investigative reporter. I use the FOI Act.' I think it gets back to Gerry's point that this information should be available. Your readers do not really care where you got it and I think it reads like, 'This news story brought to you by Murray Elston.' It's a commercial.

Matt Maychak

I disagree with that myself because I think you are trying to impart information to the reader, in my case as much as possible, and the more information you give them, the better off he is and it is also a way of saying, 'They did not give this to me because I asked for it. I had to go through this extra step to get it.' and that should alert them, the reader, to the fact that this may be more interesting reading than it would be otherwise. John, do you have a comment?

John Minor

I would also disagree with Hank because I think the times when you get it, something under the Access Act or the Freedom of Information Act is not innocent in itself.

Fred Jones, Coordinator
Freedom of Information and Privacy
Ontario's Ministry of Revenue

As I listen to the panelists' discussion, I am convinced they do not know what the Act says and I would ask each of you what do you think you are entitled to under the Act, you being no different than any other citizen, because you have no special rights under the Act?

Gerry McAuliffe

Let me start by saying that we have never claimed, or certainly I have never claimed, that we have ever been entitled to anything that the ordinary citizen is not entitled to but long before the Province ever thought of a "Freedom of Information Act", there was a provision in the Municipal Code and in the Education Act that allowed everybody access to information on a very broad basis. It was contained in one paragraph in both those acts and it said this, "everything with the exception of interdepartmental correspondence and correspondence between the corporation and its solicitors is public information." That is the bottom line on it. They had freedom of information long before the Province ever got into the act.

Fred Jones

Yes, but I think you are talking like a politician now. I think the question was, what is your understanding of the Act as to what you are entitled to under the Act?

Gerry McAuliffe

I do not know what I am entitled to under the Act until we have gone through a number of appeals, until it has been carefully laid down. I have some stuff in the process now that I am not at liberty to discuss here (for obvious competitive reasons), that are going to take probably months to resolve. Information that, I think, under the Act, it is very clear that we are entitled to it but it is obvious that the people disagree with that.

Matt Maychak

If you are trying to catch me and see if I can list several things I am entitled to, I will admit that I cannot list several things I am entitled to and you are perfectly entitled to say that means I have not done my homework on the issue but I will also tell you that for the vast majority of reporters, that is the reality. For the vast majority of reporters, they try to get it through the Minister's office or through some government office and then the FOI's the next step they take. It is a last resort and that is when they turn to it. If I could add one thing, one of the things I found in talking to other reporters, they do not know what they are entitled to and they feel that they have to know exactly what to ask for if they are going to get anything. If they dot an "i" or they leave out a comma or they phrase it a little wrong, many of them feel that they have to know that it is document 62B, a certain date and otherwise they will not get it. They could be wrong; they could be right but I am telling you that is the belief among the handful of reporters, and that was all it was, that I spoke to.

John Minor

I think it is impossible to say what you are entitled to because you people write the rules. The example in the Cami contract where all of a sudden when in the first round it is exempt, because it is going to cause undue financial loss or gain, that Cami had made its statements in good faith. I think the Act is so big, there are so many exemptions that can be applied in numerous ways, particularly things like Cabinet documents. What is a Cabinet document? How far does that extend? Anything that is shown a Cabinet Minister? I mean, you never know until you try. There are some other reporters in this audience too that have used the Act. You never know what you are going to get or what you are entitled to simply because the rules can change. I find the rules change from ministry to ministry and from Federal department to department.

Hank Daniszewski

You ask what we are entitled to know? As a member of the public, I think we are entitled to know what the Director of Education makes for a school board. He is a public servant. I certainly know what the teachers make because the trustees are complaining about that all the time but I do not know what a director makes or some of his subordinates, not even a salary range in most cases and I think I want to know how much the school board has budgeted for such and such a school or a school purchase site, after it has been bought even. It is pretty basic stuff that is not getting out.

Chris Berzins, Coordinator
Freedom of Information and Privacy
Ontario's Ministry of Labour

I think some of the points the panel has made are well taken. I guess I have a couple critical comments in response though, and one is, I think, as media you are in the perfect position to make your comments known or your experience with the Act known to the public and I have seen very, very little. I mean, if people do have bad experiences or some positions are taken on requests that are ridiculous or whatever, well, write about them. One of the things people do respond to is ridicule if nothing else. Actually people are aware. One point that tends to move heads is when you tell them that the decision may be reviewed by the Commissioner, and that the Commissioner may tell you that you are way off base. Just following on what Mr. McAuliffe said at the end in terms of the media's participation when the Bill was initially being debated, one of our own experiences, I think, kind of reflects this type of thing to a degree of interest, I guess. We have had a number of media requests. One of them did involve the identity of the requestor, a media request. The media individual was asked to make submissions and declined to do so. Only after discussing it with the individual later, did that person realize that there may have been some issues that they did want to have addressed.

Gerry McAuliffe

I just wanted to say, your point is well taken. The difficulty is this law is like every other law, until is has been tested in a number of areas, I do not think that anybody can offer any kind of critical assessment on it. It is just too early. It is just that simple.

Matt Maychak

I would say we are not critics; we are reporters. There are instances when you get an FOI request turned down and that would be news. If they would not tell you what the Premier made, you could obviously do a story and that would be considered news but most of the requests I think we make are not news unless you get an answer and saying we did not get this document, it is like reporting the Leafs did not play last night. I think, generally, we are not in the business of turning heads within the government, hopefully. We are in the business of informing readers and if we do not get the information, there may not be a story in it for us.

David Grossman

Are there any questions from people outside of ministries? Ma'am?

Anne Gray, Coordinator
Freedom of Information and Privacy
Ontario's Ministry of Consumer &
Commercial Relations and
Ministry of Financial Institutions

Does that mean I don't get to talk?

David Grossman

No, go ahead.

Anne Gray

I have one question and a comment to make. The issue of what it is, your request has to be specific. I know that is very difficult as I get these requests which are very general and then, I, myself, am faced with tracking down records and there is so much out there, it is very hard to pinpoint things. I have also had a young reporter show up in my office and say he wants to do background research on these people and he looks at me and he had not gone to the library, and he had not tried other sources. Maybe there is some misunderstanding as to what the freedom of information process is. You do have to do some amount of research before you come to us, to get some idea of what you're doing and if you talk to the coordinator before you file the request, maybe they can put you in touch with people within the ministry or agency that might be able to help you further refine your request.

Now the question I have. I thought you might be able to be of use, since I'm sitting here. We've got an issue that I'm trying to figure out what to do with right now and that is we do investigation reports on certain incidents such as if a propane tank explodes or a stuffed teddy bear falls apart, something like that - technical standards - and sometimes something happens and we think, 'Gee, other people should be warned about this but they aren't going to pay attention if we just issue a news release with just general facts.' So, our communications people sometimes in the past have released names of people who have been injured in incidents and we've just run into this problem in that the families of these people or these people themselves may not want their identities released. It's a personal privacy issue.

Maybe they have a very good right not to have their name out in paper just because they got blown sky high in the air but on the other hand, our communications people are telling me that if we just say, you know, a 30 year old man flew 100 feet through the air because of this explosion and consumers should be aware, the media's going to come back and say, 'Who was it? We're not going to run the story unless we know exactly who it was.' Now, do you have any ideas about how I'm supposed to reconcile these people's rights? Sometimes the investigation is not finished and the family of these victims or the victim himself will say, 'We're not going to cooperate with you any more. You released our name."?

David Grossman

Is that addressed to anyone in particular?

Anne Gray

No, any help I can get, I'd appreciate.

Matt Maychak

I think John should first apologize for going in there without doing his homework! I am trying to remember all the points, but the last point, I can tell you if I bought a toy or someone bought a toy, if we get a press release and it says someone -- it's a month before Christmas and it says, someone bought a toy teddy bear made by such and such a company and when he hugged it, he ended up 30 feet, in his neighbour's livingroom, we are going to report that but generally speaking, it is a better story if you have Joe Schmoe say, 'I picked up the teddy bear and I ended up in Joe's livingroom.' So I think we will report things if there are not names involved if the story is big enough but quite often, it is a better story if you have the person identified and I would say to that person he may not want his name in and he may be entitled to not have his name in the paper but he will be called and he is entitled to say no. In terms of your earlier point about reporters being too general about what they ask for, I just say that we have not used the Act enough and I think we should be using it more.

I am sitting here feeling guiltier by the moment because I have used it two or three times but perhaps if you are a coordinator and you feel there is some information that you would like to get out or you feel that in your particular ministry, there are people in the civil service who feel that and in journalism that feel they don't have enough to do or, I was given this job, I'm supposed to cover such and such and nothing ever happens on my beat -- I hear that from reporters. If you feel that, pick up the phone and call a reporter and say, 'I would like to get to know you better. I would like to call you. I would like you to know this is here.' This is the type of thing available to you. If you want it used better, communicate with us. I am not saying we are doing enough, I don't think we are, but do not be afraid to call a reporter. A lot of people sit there afraid reporters are going to call them. We are not monsters, call us.

Anne Gray

Unfortunately, time is a real problem. We are all very busy. There is no money allocated towards assisting ministries.

Gerry McAuliffe

Isn't that beautiful? That is what it is all about, isn't it?

David Grossman

Judging from what I hear, you might have a story in about 20 minutes, as soon as this is over. So, you might want to talk to these people. I just have a question because time is going on and there are a number of people out here that for one reason or another did not want to ask questions and they have thrown it to me. This could add fuel to the fire and belabour this whole session a little longer but a lot of folks out here, a lot of folks in general, we share this over a cup of coffee earlier, do not like you. They do not like you not as a person, they just do not like you as a reporter. They think that for the most part when they talk with you, the comments will be taken out of context, of a 20 minute interview, only the last two minutes will appear. Their quotes are not misquotes. Sometimes they are misquotes. Sometimes they say something to you that maybe they should not have said in the first place and you run with the story and it is on the front page or it is a lead item on the six o'clock news and these people have to respond to their supervisors the following morning about that night. A lot of them feel that it is not their job to talk to a reporter. I wonder if, panel, you could hit any one of those issues and give the people out here something to take back with them. Matt, you mentioned a little bit before that we are not monsters. I know that feeling when I go out to report. People look at me and say, 'I don't want to talk to you because whatever I say won't appear factually.' That says to me, boy, I'm a hell of a lousy reporter.

I think it is my job, as a reporter, to go out and state the facts, both sides of the story as much as possible. Granted, not at all times do we, as reporters, have that opportunity, nor do we have the time or the space to elaborate. I think there has to be a feeling on the part of you people out there and the people in the media that we have to work a little bit better together. We all make mistakes. You do and you will and we do and we will but if there is a problem that you have with a reporter, whether it is in Barrie or in Toronto or in Timmins, it is something where you have been burned, as the expression goes, the responsibility is yours to call that reporter up and say, 'Look, something just did not appear the way it should have been.' Otherwise, that comment could come back two or three weeks or months later and resurrect itself.

At the same time, these people and I am sure that they will agree with me because other members of the media have, throughout the province, that they want to know when something is goofed. There are many times when they write their stories and they go home and some editor comes along, is that right gentlemen, and they edit your copy and some key element comes out of that story and a writer comes along and writes that big, bold, black letter headline that gives you two sides of the whole story. It is not these people. It is somebody else. So, I think the onus is on both of us to work a little bit better and maybe afterwards, during coffee, hopefully, some of you people out there will have a chance to elaborate and talk a little bit more about specific issues with the gentlemen up at the front.

Gerry McAuliffe

Could I just make a very quick response to that observation? Unfortunately, much of what David Grossman says is correct. Regrettably, I have to tell you after 30 years in the business, the profits of the news industry in Canada exceed $100 million a year. I know of no other industry that invests so little or cares so little about the training of its people. We hire people, raw out of journalism school, assign them to stories that are way over their heads. We have an industry that does little to keep or attract the most senior people in the business in the jobs that mean so much to the quality of what it is you read, listen and hear. All I can say is, if you get screwed, you should raise hell about it.

David Grossman

Last question, sir?

Fred Jones

A few years ago, the Freedom of Information and Privacy legislation was introduced into the Federal government. It is at the provincial level now and in a couple of years it is going to be at the municipal level and there is some thought of it perhaps migrating into the private sector as well. Should it migrate to the private sector? Should the FOI or Privacy Act apply to the media, including print, and could you justify your response whether it should or should not?

Panelist

As far as it migrating into the private sector, my own feeling is that it should apply to the private sector when public monies are involved. Beyond that, I think it is up to the private sector. I just cannot see that -- there are so many problems with industry right now just trying to get third party information on their involvement with government that I just cannot see it going into that area.

Audience Question (Unidentified)

What about the media itself?

David Grossman

What do mean by that, sir?

Fred Jones

I guess what I mean is for instance we want often, in the government, by way of the legislation to protect the privacy of individuals. You want to protect the privacy of individuals as well, sometimes a source. You are very reluctant to name your source. Why should not this legislation, in the private sector, apply to the media?

Panelist

The law applies to the media. Journalists have no legal right to protect their source. They can be thrown into jail just like anyone else. If I do not disclose a source to a judge, he throws me into jail for Contempt of Court. It's as simple as that.

Fred Jones

You won't disclose it to anyone else who asks you, who your source is?

Panelist

That is what I am saying. Anyone, for instance, now can ask the government any question and they are obliged to respond and they must claim exemption or be told to respond.

Gerry McAuliffe

I wish that were so.

Fred Jones

And they must claim an exemption if they do not want to or cannot respond. What if an individual asked you who the source was of a given story? Should you be required to disclose it? That's what I'm asking.

Panelist

I guess in a journalist's moral ethic, when they refuse to name a source, they are claiming an exemption. With us, the final arbiter is not the government or the commissioner. With us, it is a judge who calls you up before the court and in some contempt cases, your publisher as well and that would be my response to that.

Hank Daniszewski

I do not think you can be thrown in jail for not disclosing a source. I can.

Fred Jones

I'm not talking about the court ordering you to release a document or the source. I am asking if any member of the public wants to know who the source was on an item or article which appeared in the paper, would you release that to the requestor? If not, why not?

Panelist

In most cases, or the vast majority of stories, you do name the source, whether it be the FOI Act or the Premier of Ontario and in those cases where we do not identify the source, it is usually because there has been an undertaking where the source has asked you not to do that. Perhaps it is a civil servant who fears losing his job and you feel the information is worth doing. We could do a three-day seminar on sources. I mean, sometimes you sources say too loosely and sometimes the source is full of it but hopefully, the journalist knows the source, trusts it, and confirms what she or he is told.

Hank Daniszewski

There is a basic distinction here between public and private. I mean, if you work for a public agency, a taxpayer-funded agency, that is why we have a lever there to ask for information. I cannot phone the president of General Motors and ask him all sorts of personal questions about his corporation because he can tell me to go jump in the lake and that is fine. It ends there because they are a private corporation but that is not what we are talking about. We talking about public agencies here. Windsor Star, Southam Incorporated is a private agency. How we gather our news is, I suppose, our business. We do not receive government money, except for maybe those preferential ad rates or postage rates but I think that is a distinction.

David Grossman

We have a time problem, gentlemen. Closing comment if I may, Hank, with regard to the subject, "The Freedom Of Information Act: Does It Work For Journalists?"

Hank Daniszewski

I just want to touch on something you said earlier about the relationship. It is true that we are not very popular both with civil servants and politicians. I do not think we should be. It is nice to have respect there but I think it is a lot like your dentist or your tax collector. I do not think we are ever going to be popular. Thems the breaks. I think we do have a vital role in society and try to get along.

David Grossman

John?

John Minor

Maybe a little less philosophical note. I think the real test of the Act will come when it is extended to the school board and the municipality level and I think that is when the real fun will start with it.

Matt Maychak

I would say for the vast majority of working journalists, day-to-day, the Act is not working because they are not using it. So, maybe that speaks something to the government's selling of it. Maybe it speaks to the media itself but if it is going to be an effective Act, it is going to have to be used for it to work.

Gerry McAuliffe

I simply say ditto. I do not understand why it should take 30 days to get a basic answer to a very simple question. When they solve that problem, I will find some praise.

David Grossman

You have heard it. We have had pros; we have had cons. There are obviously concerns, concerns in long delays, roadblocks and costs, rules, negative aspects of the bill, bureaucracy, the fact that it is too early to tell. Yet, there is some feeling that maybe for those of you who are in municipalities, you have two years to work with local media and try to pro act. Get them on your side, if it is at all possible. Some ministries and agencies have said, 'No, it's impossible.' Yet, they have tried and in fact, it has worked. The feeling is that if you are going to get a knife in the back, at least try to get a few bouquets periodically.

Ladies and gentlemen, we have tried to hit the subject fair and square as much as we could in the course of an hour. As I mentioned at the start, we are short of time.

We want to remind you that at four o'clock, which is about 15 minutes from now, is the next session in the Commonwealth Ballroom. It is plenary session, "Comparison of the Appeal Process" with John Grace as the Moderator. We have pen and pencil sets on behalf of the Conference Committee that we would like to present to each member of the panel and whether you agree or whether you disagree with the comments, we hope you will join with me in congratulating our panel and congratulating yourself for making this session a very interesting one. Thank you.

LOCAL GOVERNMENT AND FREEDOM OF INFORMATION

Stephen McCann, Manager
Policy and Planning
Freedom of Information and Privacy Branch
Management Board Secretariat
Toronto, Ontario

I would just like to introduce myself. My name is Steve McCann. I work in Management Board of Cabinet. You had a chance to hear our Minister, Murray Elston, address you at lunch-time and as he mentioned, one of the on-going projects for which we are responsible is the extension of the Freedom of Information and Protection of Privacy Act to local government and I am, I was going to say in charge of but that is a pretty arrogant word so, I am involved with that particular activity of the responsible Minister and I am going to talk about that in more detail in a minute. The first thing I would like to do, however, is introduce our panelists. We have an excellent panel for this subject today and I want to introduce them to you. I am going to introduce them to you in the order that they are going to speak. That is not quite the order in which they are sitting but I will make sure that I identify them properly.

Our first speaker is going to be Carole Wallace, whom you have no difficulty identifying here. Carole graduated in 1968 from the University of Winnipeg with a Bachelor of Arts in Sociology and subsequently pursued graduate studies and a rather interesting mix of political and social activities in the United States. However, one thing that I very much admire about Carole is that in 1971 she settled down in Montreal, in a Francophone area of Montreal and over the course of the next few years made herself, well bilingual is hardly the term, bilingual, bicultural and as a result has had a very distinguished working career in Quebec in a variety of political, social, economic causes. She was associated with the Action Travail de Femme for several years and had some very interesting legal and other experiences that came out of that. She got to know a great deal about Human Rights and other areas of law, although as she has pointed out to me when I have talked to her, she is not a lawyer, but by experience, she has certainly learned a lot of law and that was perhaps one reason why in 1987, she was named to the Quebec Access Commission and she is currently serving as one of the three commissioners in the Quebec Access Commission and in that capacity has been involved in a number of decisions and issues involving local government, which she is going to talk about in a few minutes. So, we can get a really good perspective on the Quebec experience from Carole.

On my immediate right here, I have John Cyr, who is the City Clerk with the City of Ottawa and John, it's got here the year in which you began your employment with the City of Ottawa, but I will pass to higher and better things. John has served up until 1978 as the Director of Staff Relations in the City of Ottawa and his responsibilities included the negotiation of approximately 10 collective agreements including police and fire departments and he was responsible for grievance and resolution of rights disputes and a variety of other labour relations type matters. From March '78 until March '85, he was Commissioner of Personnel Services in the City of Ottawa and was responsible for the personnel administration in that city.

Since 1985, John has been the City Clerk of Ottawa and I think there are many of you here that know the duties of a city clerk far better than I do but at least in my learning experience since I have been involved with local government issues, I have come to see that the city clerk is a pretty important figure in a municipal corporation. Provincial civil servants all sort of look to the Deputy Minister as this rather supreme mythological figure and the City Clerk has some of that air in municipal government, but not John - he is a very down to earth and straight forward fellow and John is going to give us a perspective on how the City of Ottawa is going about implementing and dealing with the issues that the Freedom of Information and Protection of Privacy Act raises.

Our final speaker on the extreme right, I always find that a strange phrase to use but anyway is Mark Hopkins, who is the Director of Records and Archives for the Municipality of Metropolitan Toronto. Prior to joining the Metropolitan Toronto government in 1985, he spent 11 years in the Public Archives of Canada (now, I believe, called the National Archives of Canada) and Mark has been involved in a wide range of information activities, information management activities in his career, records management, computerized records and archives applications and I think a very exciting project that he is currently responsible for is the development of an Archives and Records Centre, worth in the neighbourhood of $10 million. This is a facility for the archives and records of the government of the Municipality of Metropolitan Toronto. So, Mark is responsible for the development of this archives and records centre. For those of you who would like to know where it is, it is just down the hill from Casa Loma on Spadina Avenue in the middle of Toronto. I live around there. So, I walk by there quite frequently. I believe the shovel is in the ground now and things have -- the shovel is almost in the ground and things are starting to move along. Mark is also chairing a task force on implementing the Freedom of Information and Protection of Privacy Act in Metropolitan Toronto.

So, those are our speakers. Now, what I am going to do is give you a very brief introduction to the topic because I thought it would be awkward if some lead-in was not given to the topic we are going to discuss today and then I am going to turn it over to the panelists. Just one prior thing I should say is that John Cyr has provided me with a copy of some notes he has which I think he will be discussing during his presentation. We are going to arrange to have copies of those notes made and they will be available on the Management Board Secretariat desk, not today but tomorrow. We do not have facilities to have them copied today but there will be copies out there tomorrow. So, those of you who are interested, please help yourself to a copy some time late morning tomorrow.

Now, I know there are many representatives of local government in all its guises here today; -- municipal corporations, boards of education, police forces, library boards, public utilities commissions, etc. and I am really gratified and glad that such a cross-section of local government people have been able to attend today. I think that is an indication, as the Minister said at lunch time, of the interest that you feel in this legislation and the concern and I suppose, to some degree, the trepidation, that you feel about it. I think we had better make clear at the start that we cannot possibly answer all of the questions that you might have about the application of the Act today. That just would not be humanly possible in an hour and it is not in any event the purpose of this meeting today.

What we are going to provide today is some, I think, commentary on different aspects of local government and Freedom of Information and Protection of Privacy legislation. We will see Quebec, which has had the legislation in force for several years. We will see how some local governments in Ontario are going about dealing with it. I think this will give you an overview of what the issues are; what the concerns are; what you need to be doing; what you need to be thinking about, but this is no substitute for training and education and orientation. All of that will be forthcoming at some point down the road. So, please do not feel that this is the last that you are ever going to hear of this today. You are going to hear about it until you wish you had not in the next few years. So, this is just an introduction.

Now, I just want to introduce the subject briefly, as I say, because I do want to leave time for questions. So, I am going to run over this pretty quickly. I think most of you are aware that while the Act was still in committee stage in the Legislature it was amended so that as of January 1st, 1991, local government bodies will be covered by the Act and when we say local government bodies, we mean a very wide sweep of public sector bodies. We have already mentioned some of them: municipal corporations, school boards, police forces, public utilities commissions, library boards, transit commissions. There are something like 2400 of these bodies all together in various parts of the Province of Ontario and I think it is in recognition of this very diverse group that the legislative committee realized that just making this amendment to bring local government under the Act wouldn't work unless some time were allotted and so, that is why, I think, the date of January the 1st, 1991, was chosen as the coming into force date for local government.

So, the date which all this revolves around is the first of January, 1991. You heard the Minister at lunch-time talk about the consultation that we have been carrying out with representatives of local government bodies. I think that has been a very rewarding one, from my point of view. It has given me an opportunity to learn a lot about local government. I hope that in due course, it will be rewarding from your point of view in that the results that will be forthcoming will be things that you can work with and live with and support in the next few years. Just a couple of things that I would like to say that I have concluded from talking to a lot of people about local government and the application of this legislation.

I think, first of all, there is very wide acceptance of the notion that freedom of information and privacy protection are ideas whose time has come for local government in Ontario. When I say wide acceptance, I do not by any means mean unanimous acceptance but I mean a large degree of acceptance. I do not think we are talking any more about whether this type of legislation should apply to local government. I think we are talking about when and how and what needs to be done to make it workable and that is, I think, good and in accordance with the wishes of the Legislature and the population of Ontario.

Now, we recognize that the Act does require some modification. There is no question about that. The Act, in its current form, was drafted with ministries and agencies of the Provincial Government in mind and some of it just will not work properly for local government. For example, we have to look at things like the structure of local government bodies, which often revolve around a Council which is either elected or appointed, which has committees which do much of its work and so on but it is a very different structure, very different governmental set-up, a very different way of working than the Provincial Government, for example, which has institutions such as Cabinet and ministerial responsibility which are not present in local government. So, there is an example of an issue where some changes have to be made to make the Act work. I think these are by and large changes of degree, changes of detail. They are not changes of fundamental principle.

The other thing I want to say is that the biggest need that has been identified in all of this is the need for training and awareness and we are keenly aware of that. I think a lot of people are saying to us, 'Well, we are willing to comply with this Legislation but we have to know what it is that we have to comply with' and that is a very valid, legitimate view and I think it re-emphasizes the need for training and I am not exactly sure how we are going to address that in the long run but we certainly are going to address it. I think you will see that some coherent and useful form of training and of instructional manuals, etc. will come down the pipe well before 1991.

The last thing I would like to say, I am just kind of running over this quickly to save time, is that the Minister's intention is that amending legislation be introduced in the Legislature next spring, that is legislation to amend the Freedom of Information and Protection of Privacy Act. He would like to get it into the Legislature next spring so that there can be ample time for education, training, all of these things on the basis of the text of the Act, more or less as it will finally be in 1991, rather than on the basis of what it looks like now, which is in serious need of modification and to that end, we will be circulating in the near future, a discussion paper on the issues and concerns and matters that have arisen so far. That discussion paper will be widely circulated to local government. We will be looking for some feedback on it or at least trying to use it to initiate an education process and so, I would commend that to you. All of you here will have a chance to see that and comment on it.

So, that is all I am going to say for the time being. I am now going to ask Carole Wallace to address us and then the other speakers and then, I hope we will have time for questions. Carole.

Carole Wallace, Commissioner
Quebec Access to Information Commission
Montreal, Quebec

Thank you. First of all, am I speaking English? I sometimes wonder. First of all, I want to thank you for this opportunity to speak to you. Amongst other things it is a lot of fun to be speaking English again, which I do not get much chance to do it with the Commission d'accès à l'information. I've watched, with a great deal of interest, as Ontario has adopted legislation to promote access to information and to protect privacy in the public sector and I have really looked forward to this conference as an opportunity for being able to exchange and to talk to you on a one to one basis, to listen to your questions and maybe to answer some of them, based on the Quebec experience. So, I am going to try and make my remarks brief in order to leave time for that. Hopefully my comments about what has happened in Quebec will be useful to you as you move into the 1990s.

First, a little bit about our Act and what our Commission does. Adopted in 1982 under the Levesque government second term, the Quebec Act came into force in 1984. It is cumbersomely titled in English, 'An Act Respecting Access To Documents Held By Public Bodies and The Protection Of Personal Information'. Our law, like yours, has a double purpose. It provides a mechanism by which citizens can gain access to documents held by public institutions and it also sets a number of ground rules for the protection of personal information, which is held in the public sector. Approximately 3600 public and para-public institutions, including some 1500 municipalities, are subject to the Act in Quebec. I should add that all of these institutions came under the Act at the same time, in July of 1984. So, it is now a little over four years that local government has been subject to the Act in Quebec.

The Act also sets up an Access to Information Commission, consisting of three commissioners, named to a fixed term by the National Assembly and it is staffed with 40, including 11 professionals, most whom work on privacy issues, and 6 lawyers, most of whom tend to work on access related issues. Our Commission has a split personality. On the one hand, it is an administrative tribunal, empowered to review decisions concerning access to documents and to personal information and on the other hand, it is a regulatory body, working in the area of protecting personal information.

Since July of 1984, the Commission has received 667 requests to review decisions relating to documents held by public institutions. The largest number, about one third of these requests, has come from the local government sector and specifically regarding municipalities. Only about 40 percent of the requests end in the Commission actually having to make a decision because close to 60 percent of them are settled before the hearing. Usually what happens is that the public body does give up access to the document.

So, when the Commission receives a request for a review, which cannot be settled informally, the case is assigned to one of three commissioners, who generally proceeds by convoking the parties to a hearing at which both sides present their arguments and the evidence which they consider to be relevant. After examining disputed documents and considering the arguments, the Commissioner renders a decision, which is final unless appealed to the Court of Quebec. The Commission's decisions are regularly published in a volume, which looks something like this and which is extensively used by heads of institutions and citizens to try to figure out how the Act would apply to a particular kind of document. At this point in time, the Commission has rendered enough decisions so it really does give a good idea and I think it is a big help to Heads who use it in deciding whether or not a particular exemption applies.

As for cases involving local government, I should mention that the cases we see before us are occasionally difficult ones and I will explain. I think one has to realize that citizens have particular expectations about local government. They expect local government to be open government and in addition, municipal legislation in existance prior to the adoption of Quebec's Access law, and still in effect, provides for public access to a large variety of documents which are considered to be in the possession of the city clerk. When it is a decision by local government to refuse access, occasionally it becomes a subject of heated debate during public council meetings, which are often covered by the press and when this happens, as you can well imagine, the parties tend to be quite polarized by the time the dispute reaches the Commission.

Thus far the Commission has rendered 83 decisions in access cases specifically involving municipalities. In one third of these cases, the refusal was upheld because there was an exemption that the Commission considered to be correctly applied. In the other two thirds, the Commission reversed the initial decision, either wholly or in part. In many instances where the initial decision was overturned by the Commission, it was because the disputed document was shown to be one of those documents in the possession of the city clerk and therefore public. In order to give you some idea of the kinds of access requests we have seen involving municipalities, I would like to cite the following examples.

Last year a resident of Isle St. Laurent sought access to an engineering report regarding the sewers, the city's drainage and sewage system. The city refused access on the grounds the report might influence a class action suit brought by city residents subsequent to extensive flooding which was caused by the torrential rains which we had last year. In another case, an investigative reporter for the Montreal Gazette interested in police disciplinary procedures wanted copies of reports issued by the Disciplinary Committee of the Montreal Urban Community Police Department. Citing privacy provisions in the Act, the police department refused to reveal this information.

Still another case was brought against the Environment Service of the Montreal Urban Community by an environmental group. The group wanted test results showing the quality and type of contaminants which were being dumped into the sewage system by a local manufacturing firm. Although the information had been compiled by the C.U.M.'s own technicians, the C.U.M. refused access on the grounds that the test results constituted confidential technical information, supplied by a third party.

So, that gives you an idea of the kinds of access requests that one might see in an Access Commission covering local government. But as I have also already mentioned, the Quebec Access Commission is not only an administrative tribunal, it is also a regulatory body, charged with overseeing the protection of personal information held by public institutions and as such, the Commission is empowered to investigate complaints that are brought by individuals and can also conduct compliance audits on its own initiative.

Since 1984, the Commission has dealt with 22 complaints against local government. Let me give you one case as an example. The Quebec Legal Rights and Freedoms filed a complaint against the City of Pointe Claire, which is a suburb of Montreal. The complaint originated with a resident of the city who objected to the information that he had been obliged to provide to city enumerators in order to get his name on the election list. This information included the name, sex, birth date, religion, occupation, mother tongue and citizenship of each household member. In addition, he was required to provide his telephone number and information about his children's activities. In addition to being told that he could not exercise his right to vote unless he provided this information, he was also required to sign a blanket consent form authorizing the city to disclose the information.

The Commission's investigation revealed that the City of Pointe Claire had decided to kill two birds with one stone by collecting information for statistical purposes at the same time as it was constituting its electoral list. In so doing, the City had violated several provisions of our Act. It had obliged residents to supply information which was not necessary to the city's mandate or its operations. It had failed to inform residents of the purposes for which this information was being collected and it had required residents to sign a consent form which did not respect the confidentiality provisions in the Act.

Subsequent to the investigation, the Commission made a series of recommendations to the City of Pointe Claire, regarding future census-taking activities. It also ordered the city to delete unnecessary personal information including telephone numbers and religious affiliation from its statistical database. I think this example illustrates, in a very concrete manner, the extent to which what are regarded as rather routine practices may have to revised in order to bring them into line with new legislation which protects personal information.

Other complaints, which we have looked at, have demonstrated that the Quebec Act does not always ensure that sensitive personal information is treated in a confidential manner. As I have already mentioned, Quebec's Access Law states that personal information which is public by virtue of being in the possession of the City Clerk is public and therefore not considered to be personal information under the Act. Thus, in deciding whether or not to deposit a given document with the City Clerk, City Council members exercise enormous discretion which can result in the loss of confidentiality of personal information. To give you one example, at one City Council meeting, the mayor of a small municipality, filed with the members of city council an evaluation, a work evaluation, of one of the employees of the municipality. As a result, that information, which under our Act would have been considered to be confidential, became part of the public record and was available to the public.

Finally, a word about the police and personal information. Before the Quebec Act came into effect, Municipal Police routinely released the names of victims and suspects along with other personal information of a more or less sensitive nature. Much of this information was relayed to the public by the media and very little, if any, attention was paid to privacy rights. Since the coming into effect of the Act, Montreal Urban Community's Police Force has revised its policy and now refuses to release the names of victims. This decision has been hotly contested by the media. During Parliamentary hearings on the access law held this past spring, media representatives argued that privacy considerations should give way, in fact must give way, to the public's right to know. In addition, the Montreal Gazette has just recently asked Quebec's Superior Court to order the Montreal police to grant access to information concerning victims, this time in the name of freedom of the press.

It remains to be seen how the Legislature and the Courts will respond to the media's position on this issue. In the meantime, I can only underline how difficult it really is to protect personal information which was previously considered by the press to be in the public domain.

In conclusion, the Quebec experience seems to indicate the inevitability of a transition period during which it will be discovered that a certain number of established local government practices do not respect the Act. Changes will have to be made and some of them will only come about when informed citizens challenge the status quo. Nonetheless, in adjusting to the new legislation, local government stands to benefit. As the level of government closest to the population, it has always been subject to close scrutiny. So, to the extent that local government institutions do succeed in fostering freedom of information and do treat personal information confidentially, they can only stand to strengthen their credibility in the eyes of the community. For this reason, I would encourage you to think of your Act to provide for freedom of information and the protection of individual privacy not only as a series of new obligations but also as an opportunity to better serve those citizens to whom you are directly accountable. Thank you.

Stephen McCann

Thank you very much, Carole. Since we have heard something about Quebec, now it is perhaps logical to jump across the river to la ville d'Ottawa and John Cyr.

John Cyr, Clerk/Treasurer
Ottawa, Ontario

What I will talk about principally is a corporate records management program. We've had the program at the City of Ottawa for about 12 or 13 years now and of course, like many of you we found out that the promulgation of Bill 34 and the requirements under Bill 34 which we thought were going to be just horrendous and which are going to be but we found that our particular management programme which we developed, our records management programme, is greatly going to assist us with meeting the obligations within the Bill. So, I will talk principally this afternoon on the Corporate records management programme.

First of all, the City of Ottawa's first step towards the implementation of Bill 34 was a development and approval of an implementation strategy and to that end, an information and privacy task group was created. That consisted of the Legal Department, the Corporate Communications Branch of my department, which is Information Public Relations really, Human Resources Department, Engineering and Works, Housing, Audit Management, Recreation & Culture, Records Management and that was all chaired by our Director of Archives and Corporate Records.

The major task to be reviewed by this task force will include the interpretation of the Act and if you read the Act or any parts thereof, there are problems with it obviously. For example, that the Act starts off by saying the responsible minister and in a municipality, obviously, we do not have a minister. So, who will be the person responsible? The Head of Council, the C.A.O., the City Clerk? These are the problems associated with legislation of this nature. The impact of the Bill on present administrative policies and procedures, the impact of the Bill on present information systems, the training of municipal employees with respect to the retrieval of information, the public participation aspect or policies that you have within a municipality and the impact that they will have on this, the development of policy recommendations on issues related to the legislation and I am talking here about boards, commissions -- in a municipality, obviously, you have library boards, hydro commissions, you have police commissions, all of which are in whole or in part -- their boards are formed by municipal politicians. The mayor may sit on the Hydro Commission. Some Members of Council may sit on library boards, this sort of thing. You have to question in your mind who then -- if you have a member of your council responsible on a different board which they are associated in part or in whole with funding, where does the information go? Who is responsible for it? You have to make these determinations.

The development of procedures required to administer the Act, preparation of entries in the director of general records and the director of personal information banks, these are the requirements under the Act that you have to file with the government, I believe annually. Coordination of delegated authority from the head of the institution for decisions relating to access requests.

Very important that people are delegated this task so that you know who the players are and if information requests come in, who is going to be responsible. Compilation of statistics and preparation of reports required by the Information and Privacy Commissioner, liaison with Management Board of Cabinet and Information and Privacy Commissioner and all of that -- arising from this, of course, will be a management plan which will enable the city to meet the requirements of Bill 34. So, this task group has a lot of work ahead of it. It started about six or seven months ago and I am expecting a first report from them.

Turning now to a corporate records management program, and here we see the word, 'corporate' throughout this discussion because it is very important now that in large organizations as well as, I suppose, small organizations where you have either centralized or decentralized activities, that you view your whole records management program from a corporate basis. You have to have control over the whole system. Heretofore, the engineer would hide his files from everybody else and nobody had access to them. It cannot be so anymore. These files and information requested these files are going to have to be made open at one time or other and it is important that you find all the information. I will give you examples of that as I go along.

In respect of a corporate records management program -- the goals of the records management program is the right records of information available to the right individuals, in an appropriate format at a low cost. Then you have destruction or archival retention and the long range plan of this is to provide a disciplined approach to the management of all records. The purpose of a corporate records management program is the efficient management and control of records from their creation to final disposition or placement in the archives. What are the basic elements of present record management programs? Well, as advisory services to departments, you have to advise departments as a central programme on how they are going to create and do their own files and how they are going to interwind with all of the other corporate records. Corporate records classification system, numbers, we use numbers, a three prefix number and that is really essential because you have different kinds of records that are all over the city or, all over an institution, which you might be dealing with.

For example, we are in the process of building a new city hall and while the engineer has a lot of interaction with Council with respect of this, so have I and so has the Director of Property and in the end, you have to be able to create a system that you are going to draw from your whole corporate structure, all of the files that contain information on the new city hall. That could be sewers, it could be sidewalks, roadways, planning issues, whatever, but it is important that your system be developed so that if someone wants information on the new city hall that you can access files or at least know where the files are of all information regarding the city hall in everybody's files around town.

Essential records, the hiring of individuals, the staffing, these are essential records. Micrographics, records centre, records centre where all your inactive files might be lodged. Retention and disposal schedules, very important. I mean, we have tons of paper. Youve got to get rid of them. Simply got to get rid of it. Otherwise, you are going to be buried in paper for the rest of your life. Standards, you have to set standards for corporate records management. Everybody has to follow the same procedure. You can't have six or seven different kinds of procedures, otherwise, your format is going to be wrong and you are all going to be in trouble.

Training, very important that people get the same training. There are various departments and there are various record filing systems in departments, as you know, and it is important that the people that are responsible in the handling of records are trained in the same fashion and of course, departmental records. Each department is responsible for their records. They cannot suddenly say that the City Clerk is responsible for all the records because you do not have control. The clerks will not have control over all the records, obviously.

The operation and services of a corporate records management program are two-fold: micrographics and records centre. In respect to micrographics, the purpose of micrographics is to replace paper records, provide security backup, and provide efficient record distribution. The benefits of them are: greater use than paper, obviously; stability; durability; it's spacing-saving and it's money-saving. The records centre, on the other hand, the purpose of the records centre is to store and service inactive records, implement retention and disposal schedules and use of low cost space. It is called economic suicide to start storing boxes of redundant papers in offices that are costing $30.00 a square foot. It does not make any sense. You have got to have an area where you store these papers where it's a very low cost, fairly accessible, easily accessible, but at very low cost. The benefits are greater control over inactive records if they are all together; you limit the use of valuable office space, focus storage and retrieval facilities in one area that provides a means for the physical destruction of records; and provides security to records.

The corporate records classification system to provide a standardized structure for the labeling of all city records, design the system based on information retrieval needs of users and that's really important. When we were doing a whole corporate records component for the City of Ottawa, we found that various departments have various needs and just a standard little system could not work for all of them. You have to tailor-made systems for them on the one hand, and on the other hand, you had to have a system that was corporate in context and you could integrate that within your whole corporate structure. Create a corporate inventory for the city's entire record holdings. That is a massive job, by the way. Provide the base for developing and implementing retention and disposal schedules and retention and disposal schedules are very important. If you do not destroy your records, you are going to have mounds of them and where are you going to keep them? Well, you'll start sending them downstairs and upstairs and clerks have been known to bring them home and store them in the basement. My house is a 14,000 square foot home, believe me.

Automation! Automating labour intensive tasks associated with the management of records, provide a standard that will permit the integration of databases relating to records in information management systems. In short, file folders, you need to use the same kinds of file folders in a corporation and you have to take time to create the index on these file folders. The retention and disposal schedule will plan the life cycle of records and by law, you might know that some records can be disposed of immediately, some are two years, five years, 12 years, 20 years and 50 years and life. So, you've got to make sure that you are getting as a person responsible for records, you plan a life cycle for these records. No use keeping records for 50 years if you can get rid of them after two years and nobody cares. Just get rid of them.

It is a systematic control of records and that is the location and control we talked about. Apply retention and evaluation which is of administrative value, legal value, and historical value. So, there are three components when you do an assessment on a retention evaluation. Protecting vital records and we had a fire back in 1930, which wiped out City Hall, so, we were very fortunate. Before asking for something prior to 1928, forget it. We started fresh in 1930, we did not have computers but it got rid of a lot of paper, I'll tell you. Not that any of us want City Hall to go up in flames.

Protection plan records and recovery effort in the event of disaster, fire and floods, to ensure continued operation. I mean if something happens to an office, a satellite office of yours that the records are destroyed, how are you going to find out what records were there? How are you going to recreate those files and they might be very important files? To protect the legal and financial status of corporations, obviously, and to protect the rights of employees and citizens.

Policies and procedures, who is responsible? Who is responsible? Who is in charge, eh? Comprehensive policy document on the roles and responsibilities of the corporate records management program and the departmental records management program. So you've got to know the people responsible. The Clerk is responsible for, as we heard just a moment ago, for all those official things that Council do. Those are official records and they are in Council Minutes and so on, however, departments have records and departmental records are -- the contents may not be known to all of us in other departments. The Engineer may communicate with a land developer for the purchasing of land. We don't know that. So, his system has to be honed in such a way that it has to integrate within the whole corporate structure.

Standards, implement standards for all records management related resources, whether staff, accommodation or equipment. I have got one minute. That's great. We talk about forms. You've got to have the same kinds of forms. Paper simplification, training, these are all components that you have to look at and finally, the scope of the challenge for those of you who are into records management. You may have a good system and I commend you. You may have a weak system you will have to improve on. The scope of the challenge -- three decades into the computer age and we have more paper than ever. We heard people say, 'With the computer age, no more paper.' We have paper coming out of our ying-yangs, believe me.

In Ottawa, just to show you, and we have a fairly good system, I think, we have -- if you take the Archive boxes and you put them one behind the other, I have 7.2 miles of boxes, if you can imagine. I have a growth of .3 miles a year and to date, only 30 percent of all my records, form part of a structured record of classification. I've got 70 percent I haven't classified yet and we're going through them. I am getting so much this way, I can't work that way. To date, only five percent of my records were scheduled for destruction and that is not the next year's program, I can assure you.

I have a secretary -- I believe in no paper, by the way, I have a secretary who sits in front of me and in the morning when I go through my mail and if I have a director saying to me, writing me a memo saying, 'By the way, I will be out of town at this conference and that conference. Copy to Susie, copy to Mikey, copy to Harry", I read mine and I tear it up and I throw it away and she says, 'My God, that's an original. Don't throw it away.' I say, '50,000 people have got copies of this thing.' I know the contents. Get rid of paper. My paper basket is full at night, believe me. I keep nothing. An efficient records management program is only good management practices.

Finally, the greatest challenge to records management is to develop and implement a cost-effective, corporate records management programme (a) that will remain continually responsive to the information needs of the corporation; (b) that is flexible enough to operate in a physically decentralized environment; (c) that will provide a framework for department heads, directors and managers to administer the record holdings the same way they manage personnel, finance programmes, facilities or any other thing under their control and (d) meet the requirements of Bill 34. Thank you very much.

Stephen McCann

Thank you very much, John. Now, John has laid out quite a program of work for us. Now, I want to ask, after we have done all this in the first week, what are we going to have left to do in the second week and perhaps that is what Mark Hopkins will address now.

Mark Hopkins, Archivist
Municipality of Metropolitan Toronto
Toronto, Ontario

John's comments about paper-work that remind me of the time when I was in the National Archives wanting to do some research on the Depression Era in the records of the Department of Trade and Commerce and during the Depression, because of budget constraints, it was decreed that they would buy no more toilet paper and they would use old files and so they had the same glut as the City of Ottawa, but for different reasons.

I think we face an interesting challenge as a municipality and it is a real challenge for the Provincial Government because we are dealing with governmental entities ranging from the size of Metro at one end down to -- I don't mean down to pictorially but in terms of size, to organizations that perhaps do not have any full-time employees and do not have any municipal buildings. I think that from the registration here that there is probably a fair bit of apprehension about what you are facing but I think that you will find with some assistance that will hopefully be forthcoming from the Provincial Government that some of this will fall into place and that you will have some good systems to address it.

In talking you today about what Metro's response has been so far, I must say that the response so far has been an administrative one, not a political one and we have looked at things on the administrative side and we would anticipate taking some of our findings to the politicians in the new year when we get into some substantive council meetings but to set a context for what we are doing, I want to briefly describe for you what Metro is. It is a very large government. It is considered by some writers to be larger than six provinces in terms of its budget which is approaching two billion annually. In terms of its area, it covers 241 square miles. It has a population of 2.2 million and it is an upper tier, that is a confederation over six local area municipalities. In terms of some of the services then, and I will identify some of these services because I think it is important to look at the kind of information impact we might anticipate, do garbage disposal but not collection. In emergency services, we do police and ambulance but not fire. We do official plans and subdivision approval, but not zoning. We have public transit, which is the T.T.C. We have a regional park system of local parks and we do social assistance program; families and singles housing and hostels and day care. We have sewage and water plants and main trunks but not the local connections and services. We do hospital grants but we do not do local boards of health, and in terms of our financial side, we do the debenture of financing for the area but we do not do the tax collection and we do not administer the local elections, thankfully.

Now, what all that means is that we are a pretty large information organization. We would estimate we would have in the range of, active and inactive files on the go now, about two million and a fair number of those are case files. There is a substantial burden in the area of social programs, rental activities and day care and so on that would press upwards towards a million files and in some of those areas we are opening in the range of 100,000 files a year and then retaining them for six or seven years and for those of you that may think, 'Well, that's all fine and good for Metro. It's a big organization and they have all the resources.' We have tons of MBAs, probably far too many, but we also, I think, are probably not much farther ahead than many of you in terms of our information management policies and practices.

I am not aware, and I have certainly spent some time trying to find this out, I am not aware that there is anyone in Metro that knows or has a list of all the programs, all the computer programs that exist in Metro and certainly, we do not yet have a handle on all our files. So, we, in the same way that a small municipality has lots to do, it's a question of magnitude and we have lots to do as well and I anticipate that our resources will be no less strained than yours.

Where I anticipate some of the activity to be, once the thing is up and running in 1991, where might we anticipate some of this activity and it is probably useful to think about that but realizing that it is speculation because it may help you to, in some ways perhaps, prioritize things. In terms of the privacy side, I think that we will see some activity in the area of our ambulance services, law enforcement certainly, and licensing and there is a real relationship for us between law enforcement and licensing. We do business licences as opposed to marriage licences and citizen and building permits. The things we deal with are quite important services to the public. For example, do not want to see licensed cab or limo or school bus drivers that have a history of violence against individuals. So, licensing and law enforcement, in our eyes, are quite closely tied.

Again, in the privacy area, I think the personnel function in certain occasions. I think where there are areas of labour relations problems or perceived problems, that we can anticipate some activity there. Where people are perhaps just trying to create some administrative nuisance, I suppose, to make a statement. The whole social benefits side has some potential, although I think that to be realistic, it takes a reasonable level of education to utilize these acts in a meaningful way but that remains to be seen. So, there is an area for advocacy there that might develop and in the area of litigation and claims where we have some legal actions going on.

In terms of some of the access activity, again, I would anticipate that the law enforcement area would be a fairly busy area. I think that, for us, the Planning and Economic Development side of things is going to become quite important and it may actually come out of some tensions between the two tiers of municipal government that we have.

The big one I think though will be environmental issues area: waste management, water quality and transportation. So, that's my crystal ball of where we can anticipate some activity and where we have to have some systems in place to address it. What have we done to date?

Well, in the spring of this year, a task force was established, which I chair, and there are a number of representatives on that task force. We tried to choose representatives that cover a variety of program areas within the corporation. We have, for example, someone from the Works Department, not actually from the waste management side which is going to be an interesting side environmentally, but someone who can represent the professional engineering types of concerns. We have someone also from the area of the policy and research in our Community Services Department and fortunate for us, also with a legal background and so with in-roads into that department, we will hopefully bring together some of our case file activities. We have someone from the T.T.C. representing the local board side of things. Someone from our Management Services Department, dealing with computer systems because we have some important computer-related issues to address.

The police as well and someone from our Treasury Department, again, both Treasury and Personnel are represented there because of the high component of personal information in both their paper and EDP systems. We tackled the thing by reviewing the legislation and the review was from an operational perspective and we then turned back that review over to our Legal Department to look at it from a legal perspective and I think it is important to have those two perspectives on it because the lawyers will have a particular focus that deals with wording and intent and structure and relationships and from an operational point of view, you have to deliver some services, you've got some roles and responsibilities that have an impact on your information systems and that has to be addressed.

Coming out then in terms of how we will try to tackle the implementation phase, we have developed or we have scoped-out some functional areas that we have to address and these are: the personnel area and we have carved out the personnel area because there is so much information from the Provincial Government, from their implementation, dealing with personnel and so it makes a fairly discrete component and it is something that all departments get involved in and has a corporate responsibility as well; records management for all the reasons that John has identified to you that it has a major impact on the way you collect and manage and use and dispose of your information; our computer systems -- it's kind of fortunate in terms of timing that we are now developing something called an HRIS, a Human Resources Information System, and being able to look ahead and see what the Act will require of us will help us to plan the structuring of data and to make some policy decisions about what can be downloaded and what can be uploaded and by whom and for what purposes. Seeing that kind of framework in the Act, will help address that and we also have umpteen other computer systems as well. I think if I was to make one comment about what John has said to you, he has talked extensively about records management and that is very important but it has to be in the context of the way the Act approaches it and the Act does not talk about files and paper. The Act talks about information and so it is very important for you to take that approach. That you are going to have to, if someone makes an access request, it is not that you just look in the files. You are going to have to look in your EDP systems, perhaps in your microfilm, perhaps in other areas as well and so you are going to have to take a fairly integrated approach to your information holdings and your information systems and for those of you who attended the Information Resource Management Session this morning, you will have some understanding of what that is all about and for those who have not, I would encourage you to lobby Steve and his folks to make sure that they get tapes and copies of some of those transparencies because it will be quite important for your planning and where you are going.

We see a need to do a lot of training at various levels. We will start generally by training the Coordinators in some detail. We will have a departmental structure in place for each department. General training for all the staff, particularly people who are dealing with the public and providing from the public or obtaining information from the public and then we will deal with some of the specific modules of training perhaps in the area of computer systems. We get into big debates as to who owns the data. Is it the people who have the computer hardware in their shop or is it the department for whom the system actually runs. So, all those things have to be resolved. Most importantly, I think, for implementation, the ball now resides in the Provincial Government's court.

We need to have some decisions made as quickly as possibly if we are going to meet the time frames ahead of us, particularly for those of us that are fairly large or have a lot to do in terms of information management. We need to know what is the institution and who will be the head of it and to what extent the definition of an institution will permit or restrict a sharing of data. We also have to know to what extent is the Act going to be changed.

Now, I have some real concerns about this because we are fairly major providers of information to the Provincial Government and it is important for us to start training now because already our staff are saying, 'Well, what happens to this one when it gets to the Province's files?' they need to have some sense of that -- and if we then have to turn around and start doing a sensitive training for something that is written quite a bit differently, our people are then going to have to know two sets of legislation. So, although there is, I think, out in the community a desire to have something re-written or something different I have some real concerns about that.

They are going to have to resolve fairly quickly to what extent we are going to have to create lists of records and descriptions of personal information banks because the preparation and dissemination of those publications is going to be a fairly sizable job. I think that there is some agreement that the Act does useful things in society. Certainly in terms of a key to the 90s, municipalities are key players, moving into the 90s. We are becoming increasingly more urbanized and government generally is becoming increasingly intrusive and increasingly large and I think that this kind of legislation puts some restraints on that.

I have some concerns about the definitions of personal information. Notwithstanding the decision coming out of the Commissioner's office regarding the market value assessment request in the Metro area, that decision does not really fall so much onto the Access and Privacy Act but onto the Assessment Act and we will have to see in the future whether the very restrictive definitions of personal information are going to be always in the context of the record requested or can you look at personal information in a more general way? Well, this is generally available in the phone book or this is generally available in court and records of court, therefore, we can open it here. That may actually have some impact, depending on how that is determined, on the quality of research use, particularly archival and historical research and it is quite conceivable as a colleague from the Archives of Ontario has pointed out that given the concept of opinion, information within the definitions of the Act, that it may become increasingly difficult to write a political biography. In that case, we will not have opened up society very much. But I would encourage you to look positively to it for the same reasons that John has expressed, that it presents some opportunities and that we are part of a general trend in society and we have an important role to play in it and can become quite facilitative. Thank you.

Stephen McCann

Thank you very much, Mark. Now, we started a little bit late and I do want to allow some time for questions. So, I am going to cut into your break time, which I know is precious after a long day but nevertheless, I am going to cut into your break time a little by asking if there are any questions. Thank you.

Audience Question (Unidentified)

This question is directed towards Ms Wallace, please. I was very interested in some issues that arose really out of your relating the example of a potential suit to be made against a municipality with respect to some engineering reports. To what extent did the Commission consider traditional notions of solicitor/client privilege and the impact of the normal rules of discovery and so forth that are embodied in a court system?

Carole Wallace

There is a disposition, a section in our Act that refers to a legal opinion. That a public body can keep a legal opinion to be confidential. Where third party reports have been prepared to be used in litigation, as you mentioned, that falls under solicitor/client privilege and we have always applied that in our decisions. In other words, because there is a disposition in the Quebec Charter of Rights and Freedoms which talks about the right to seek privileged information between a professional and his client. We have applied that which is the same as the notion in Common Law of client/solicitor privilege. So, even though there is not a specific section in our Act, we have always taken account of that.

Stephen McCann

And I should point out that there is a provision in the Ontario Act that deals with solicitor/client privilege. Are there other questions?

Audience Question (Unidentified)

Just a quick question to Carole Wallace. The publication that has the decisions of the cases, would that be published both in English and French or just French?

Carole Wallace

Unfortunately, bilingualism is not very à la mode in Quebec these days and it is only available in French.

Stephen McCann

Which I may say is kind of unfortunate because it is an invaluable source of information on a lot of very similar types of issues to what you are going to be faced with. I mean, we are really talking about the same issues in a different language and it is most unfortunate that -- maybe we can do something at some point at least to summarize some of those cases and get them around because they really do deal with issues that you will find are the same that are confronting you. Don?

Audience Question - Don

Yes, I would like to ask a question of John Cyr. John, do you have any idea what the role of the municipal associations is with respect to helping you through this morass towards 1991?

John Cyr

What is happening right now is there is a committee, really a working committee that has been established with representatives of the Ministry of Municipal Affairs, the Association of Municipalities of Ontario, the Association of Municipal Clerks and Treasurers who have been reviewing this law because we felt from the very outset that this was a government law, applicable to a Provincial Government with offices all over God's creation and really, it did not address the outward aspects of a municipality, of a board or commission, which is pretty much the same. So, this group is looking at either recommending to the government some changes to the present format of the Act, either as an Addendum or alternatively, to recommend to the government that another Act be adopted which would focus on municipalities, boards, commissions. That group was supposed to meet this month or next month some time to try to finalize our findings but I have been very active with the two groups.

Carole Wallace

I would like to address, just to make a comment in response to the feeling that there seems to be that in some ways you might need a different law or you might need a very different plan for applying the law for the purposes of municipalities. I am really interested to hear you say that because, as I mentioned during my speech, in Quebec the municipalities fell under the Act at the same time as everyone else and I do not have the impression that there has been any particular problems in the municipalities, apart from the whole question of documents under the possession of the City Clerk or some kinds of local practices but in terms of implementation, I do not have the feeling that that has been a big problem in Quebec and one of the sorts of pieces of evidence that I would put forward for that is the municipalities have never asked for any kinds of specific amendments to the Act that would apply to them. So, I think perhaps the idea of thinking about it is worse than what really happens when you actually get there.

Speaker (Unidentified)

Just a comment. I am not looking necessarily for any amendments or any special legislation that would be applicable to municipalities. I think we want to clarify a lot of the aspects of the Act. For example, the "Minister responsible". Well, we do not have ministers, unless you want to promote me, I suppose, but we don't have ministers. Is it the mayor? Is it an elected body or is it an appointed body and if it is an appointed body, who is it going to be? Same with the police commission, is it the Chairman of the Board of Commissioners of Police, which is a judge normally, or is it the police chief or who is it? Is it the Secretary of the Board of Commissioners of Police? Hydro commissions, the same thing, where have politicians on these commissions and that is all we are seeking is the clarification so nobody misunderstands the importance of the Act and its applicability.

Stephen McCann

Okay, I think we can take one more from the gentleman and then I am really going to have to cut it off, I am afraid.

Audience Question (Unidentified)

Just in terms of the school boards and I suppose municipalities as well, as we are moving towards 1991, is there anything that you would recommend that school boards do now in terms of reviewing their policies or implementing anything or should we just wait and see what happens in terms of the government review?

Stephen McCann

Well, I think you should be doing some of the things that you've heard about today such as putting together a committee of the various parts of the school board, various operational parts with a view to understanding the legislation and pulling together some sort of records management, if not program, at least focus for it, being on top of the issues that the Act has presented so far which have been described in several documents that are around, contacting perhaps the Ministry of Education to get some help from them in defining issues and that sort of thing and I think there are a lot of things that should be under way now. What there cannot be right now is training on the specifics of the Act as it will ultimately read because we do not quite have that yet but there can be a lot of development of practices and policies at a general level and I think I would be happy to discuss with you or there are a number of ways of finding out just what those activities might be in a little more detail than I can give now.

It is just at this moment when we are starting to get into some very interesting issues that I have to pull the plug and send you off to your break but a number of the panelists that are here will be here the rest of today and tomorrow and I think you should feel free to ask them questions, talk to them, get advice from them. This is a very current topic. We have some very well informed people here and I would ask you to make use of them. Thank you very much for attending this panel and your break is now.

COMPARISON OF THE APPEAL PROCESS

Tom Riley

I see we have a good crowd that has hung on. It is an indication that you are getting a lot out of this conference, I am pleased to say. So, without further ado, I would like now to introduce to you our next panel which will be moderated by our Federal Privacy Commissioner, John Grace. Mr. Grace? Thank you.

John Grace
Federal Privacy Commissioner
Ottawa, Ontario

Thank you, Tom. Well, as Tom says, my name is John Grace and I am the Moderator of this panel. First, let me introduce your two panelists now, so that it will not be necessary for me to break the spell and the wonderful flow of this presentation.

Tom Wright is a graduate of Queen's Law School who was called to the Ontario Bar in 1975. Five years later, after practicing with several firms, he opened his own practice in Kincardine, Ontario. In 1985, he joined the Government of Ontario, spending a short time at the Ministry of Transportation and Communications before being appointed in 1986 Senior Counsel with the Support and Custody Enforcement Branch in the Ministry of the Attorney General. In January of this year, Tom joined the office of the Information and Privacy Commissioner of Ontario as Director of Legal Services. He will be offering a short introductory course on the Ontario Access and Privacy regime.

Our second speaker (and they will speak in this order. I have not mentioned this to our panelists). Jim Rohman is a working newspaper man. I do not wish to imply by that that Tom is a non-working lawyer but somehow with newspapermen, you always have to say a working newspaperman and I can say that because I am a former working newspaperman. Now, of course, I am currently a non-working bureaucrat, but that is another story. Jim, apart from a seven-year tour of duty in Ottawa as Information Officer for the Federal Agriculture Department and as a speech writer for Eugene Whalen -- You still remember Eugene Whalen three or four elections after, I am sure -- a speech writer for Eugene Whalen which seems to be something of a contradiction or perhaps the definition of a redundanc, after all that, Jim returned to respectability. He returned to the Kitchener Waterloo Record where he now is employed as a staff writer, specializing in farm affairs and is a columnist. He has been there since 1963, apart from this interlude in Ottawa. Jim is the winner of some 60 regional and national awards for his work as a farm writer. He gives credit for many of these awards to documents he obtained through Access to Information. He is now at the University of Guelph on a four-month leave of absence from the Record, having been awarded a Michener Fellowship to investigate bio-technology. He is a graduate in Honours Journalism of the University of Western Ontario, where is also Adjunct Professor of Journalism.

So, we have a distinguished panel and I am pleased to be its Moderator. I should add this about Jim. You will know from this gross invasion of his privacy and I presume applied consent that he is a user of access legislation and it is from the point of view as a user that he will be speaking. We are here, according to the program to compare the appeal processes adopted by the Ontario and the Federal Governments. It has seemed to me that if we are to live up to our billing, I must depart from a moderator's traditional role of timekeeper or policeman and assert myself for the briefest of moments into the proceedings by offering a short exposition of the Federal regime. No one else here can, I suppose, or is willing to speak for the Federal regime.

The first thing to say is that the Federal and Provincial laws enshrine the same fundamental principles of access and of fair information practices. They are broadly similar in scope and in thrust but the interesting thing for us is that the most notable differences occur precisely in the appeal process, the subject of your discussion this afternoon. Quite different legal architecture was put in place to ensure that the access and privacy rights, articulated in law, are made meaningful in practice.

The first difference is that in the Federal domain, there are two, not one, officers of parliament, the Privacy Commissioner and the Access to Information Commissioner, to whom individuals who feel that their rights have been infringed may address themselves. Sid Linden then, in Federal terms, is doing the work of Inger Hansen and John Grace. The establishment of commissions, of the Office of Commissioner, is an important development.

You might be interested to know, in an aside, the fact that there are Federal Commissioners and Ontario Commissioners and Quebec Commissioners, that fact distinguishes Canadian legislation from American legislation which is also broadly similar to ours. The Americans have very good access and privacy laws but there is no one, as Evan Hendricks will tell you, no one in the American establishment given a commissioner's role, given an oversight role. So, though there are differences between the Ontario and the Federal systems, -- there are many differences -- there are more important differences between the Canadian and the American systems. Well, two commissioners; one difference.

Secondly, the distinction between the Ontario law and the Federal law has to do with the powers available to the commissioners. As you may know, neither the Federal Information Commissioner, nor myself, have the power to make binding orders. The Federal legislation provides that disputes arising under the access and privacy legislation be dealt with at the first level according to the Ombudsman's model. An appeal to the Federal Court is the second level. The tools to effect compliance are moral persuasion, publicity and reports to Parliament, annual or special reports.

Well, the obvious question. Which is the better appeal scheme? It is probably too early to say but let me make a few quick comments. First, on the relative merits of two commissioners versus one. Ms Hansen and I continue to support the separation and not just because we both like our jobs. This distinct role allows us to weigh the competing interest carefully, which I am sure Sid Linden does, and Carole Wallace does in the Quebec Commissioner's office, but we ultimately, when the conflicting interests are agonizingly close after all the weighing is done, and the interests are often agonizingly close, as Muray Elston reminded us at lunch, then each of us can come down squarely on the side of our mandate, Ms Hansen for access and I for privacy. No ambiguity or inherent conflict about our respective roles. The dual commissioner approach offer, as well, the simple luxury of a clearly focused mandate. On a full-time basis, my staff and I orient our energies to ensure compliance with the Privacy Act. I do not need to worry about occupational schizophrenia, as perhaps Sid Linden must, as I have warned him about. He said that qualified him for the job. That is a joke. My office can be identified exclusively with privacy issues. We can more easily take somewhat a longer view, perhaps, beyond the immediate demands of complaints before us. Attention can be paid to privacy consciousness among public servants and politicians. Attention paid to research into emerging privacy issues, such as drugs and AIDS testing, computer security, computer matching for example. Neither my office nor my clients have any confusion about the Privacy Commissioner's job.

Now, as to the second main difference between the Federal legislation and Ontario's and Quebec's as well, the power of the Commissioner to make orders. Order powers inevitably demand quasi-judicial proceedings. I do not know how they can be avoided. Formal procedures will require us, I believe, to maintain a distance from our clients and I think it would hinder us from doing easily what we now do nearly every day -- giving formal, tentative advice to departments and to negotiate settlements of complaints. From my selfish perspective as Privacy Commissioner, I see formal procedures as potentially damaging to the effectiveness of my office.

I think that the Federal experience and the Privacy Act illustrates the point. Although I have no power to make orders, there has never been a case in five years when a Minister of the Crown has failed to accept my recommendation to release personal information originally exempted from a requestor and while I am empowered to go to court on behalf of an aggrieved individual, I simply have never had to do so and I do not think that is because I have not been sufficiently aggressive or on the side of the complainant.

While one may argue that possessing order powers could lead to more timely expeditious complaint resolution, I quickly add, delay has not been an endemic problem in our office. Of course, we always hope that our complaint-answering would be faster. Both Ms Hansen and I, on the privacy side, believe that the classical Ombudsman's approach serves well, precisely because the Commissioner has neither judicial nor political authority. At any time during the investigation of a complaint, for example, I can sit down with a minister or a deputy minister or my staff with their staffs and without lawyers at our sides we can fashion a resolution. What would the Divisional Court of Ontario tell Sid Linden if he did that in the middle of a proceeding under the Ontario Legislation?

Thus, I have not sought the power to order disclosures. Not sought it because a Privacy Commissioner, with authority to compel compliance, I am afraid, would be cast instantly in an adversarial role. My office would be what it is not now, in a chronic state of uproar with government departments. Investigations in this atmosphere would be, in my view, more difficult than they are now. That is a quick review of what I think and what our experience has been but enough of that. Let us hear from our colleagues on the panel and then, I hope, for your comments and questions. First, Tom.

Tom Wright, Director of Legal Services
Office of Ontario's Information and Privacy Commissioner
Toronto, Ontario

Well, I don't know about the rest of you but I am certainly convinced as far as the proper appeals process but notwithstanding that, I am going to endeavour to show you and tell you a little bit about what is happening in Ontario and I would like to apologize, perhaps, at the outset for the looks of bemusement that crossed my face because I quite frankly can't believe I am sitting here in November of this year, about to talk to a group of people who have also been involved in this legislation, when in January of this year we barely had an office and we certainly didn't have an appeals process.

We have come a long way in a relatively short time and I hope that I will be able to give you the advantage of some of the things that we have encountered with this legislation, some of the problems. Perhaps some hints about how we are doing business which will assist everyone as far as the operation of this Act. I also would indicate that, unlike John, my comments will be restricted to the context of access to information only. I am not dealing with the area of privacy, which, as John has pointed out, is also covered by the Ontario Act.

It is perhaps the nature of appeals that some of the most complex cases involving the most difficult issues arrive as appeals in our office. Many of the appeals raise new and interesting issues and parties being both government and requestors, quite understandably, at this early stage see need for the opportunity to give the Commissioner or to have the Commissioner make orders as to the interpretation of the Act. To date, the office has received in excess of 300 appeals and this volume shows no sign of declining.

As John has indicated, and he has put it very nicely, the major difference with respect to the appeals process relates to the powers possessed by the Ontario Information and Privacy Commissioner. Specifically, the power to make orders. As John has indicated, and this applies equally to the Federal Information Commissioner, the power that they possess is to make recommendations to a government institution. This recommendation may be either accepted or rejected. As an example, if the Commissioner were to recommend that something take place and the recommendation was accepted, then the information would be disclosed. If the recommendation was not accepted, then the Information Commissioner or the requestor has the ability to apply to the Federal Court for a decision. The Court then has the power to order disclosure where it is determined that an exemption does not apply. If no court action is commenced, then that is the end of the matter.

In Ontario, there is a specific subsection of the Act and I will try to refrain from referring to subsections specifically but it clearly, as far as the appeals process is concerned, is a very important subsection and that is s.54(1), which gives the Commissioner the power to make an order disposing of the issues raised by the appeal. In addition to that particular power, the order may contain any terms and conditions that the Commissioner considers appropriate. Accordingly, in Ontario, unlike the Federal system, when you reach the end of the appeals process, the Commissioner makes an order which either requires the institution to disclose the information or which upholds in full or in part, the institution's decision not to disclose.

In Ontario, and we now have examples that we can point to, when the Commissioner orders that a record be disclosed, he also includes a provision that it must be disclosed within a certain time. The time that has become, if you will, "the norm", although subject to change, has been 20 days. It is then the responsibility of the institution to comply with the terms of the Commissioner's order as far as release is concerned and if, I suppose, the situation arose that the institution did not comply, there are provisions contained in the Act with remedies as to what would happen if the institution did not comply. I am pleased to say at this point we have issued a number of orders that require disclosure and we have had nothing other than absolute complete cooperation from an institution as far as disclosure is concerned.

For comparison purposes and without infringing on what Jim has to say because he has had some true experience, actual experience with appeals, I thought it would be useful to look at a similar request that has proceeded through both the Federal and the Provincial process. The example I have selected can, I suppose, be best described as a worse-case scenario and it certainly does not, in any way, reflect the norm.

The example involves a request for inspection reports related to meat-packing plants which, for some reason, seem to be popular items to request, both Federally and Provincially. Firstly, I will give you a synopsis of what happened at the Federal level. In June of 1983, a request was made for certain reports relating to meat-packers. In July of 1988, some five years later, these reports were ordered to be disclosed by the Federal Court of Appeal. I suppose, at first blush, this seems like a long time but if one looks carefully at what took place, there are good reasons and as I say, rather than infringe on Jim's personal experience, I will leave it for him to recount his experience in that particular situation.

Now, turning to the Ontario example. A request was made in November of 1987. I am sure bells will ring. Yes, it did pre-date the Act. However, the institution agreed to treat the request as a request under the Act and in February of 1988, the requestor was notified by the Ministry that notice of the request would be given to the meat packers as they were what we call "affected third parties." This notice was given and these third parties were given an opportunity to make representations to the Ministry as to their position on disclosure. The Ministry received representations and made a decision to disclose, with certain severances. Both parties, if you will, the third parties and the requestor, in the month of March, 1988, appealed to the Information and Privacy Commission, the third party with respect to the disclosure, with or without severances, the requestor with respect to the disclosure with severances (in other words, objecting to the severances that had been made). The office conducted an investigation and the third party appellants, the original requestor and the government institution made written representations to the Commissioner. In September of 1988, the Commissioner issued an order requiring that the reports be disclosed without severances. The time from original request to disclosure was approximately nine months.

Now, I am certainly not suggesting to you that this difference in time is solely a result of the fact that the Commissioner has the power to make an order. However, I do suggest that the Ontario Act recognizes the reality that administrative bodies may be better able to deal with the particular subject matter requiring a particular expertise more quickly than the court system. This is also recognizing that in Ontario, there is the possibility of judicial review under certain circumstances.

As John has indicated to you, the role of the Federal Commissioner, be it information or privacy, is more akin to that of an Ombudsman. The Commissioner's powers are those of an Ombudsman, that being recommendation and the ability to use the good offices of the Commissioner to persuade the government institution to act in compliance with the Act. This is not to say that the Ontario Act in a slightly different context does not incorporate that exact same philosophy and this, I believe, is recognized in the fact that there is a particular section of the Act that allows the Commissioner to appoint a Mediator who is authorized to investigate the circumstances in any appeal and to try to effect a settlement. Those are the words of the Act.

So, notwithstanding this power of the Commissioner to make orders, it is not a situation where the matter cannot be otherwise resolved even within the Commissioner's office in the context of an appeal. You may be interested to know that as a matter of practice, in every appeal unless exceptional circumstances exist, a person whom we call the Appeals Officer, who for example is the Mediator under the Act, is appointed and attempts to settle the appeal. This is certainly something that we recognize as being extremely important and in fact, perhaps lends itself more toward the role of the Ombudsman as opposed to the necessity to make an order in every situation.

It is also by way of experience for those of you involved in the day-to-day operation of the Act, that settlements have been achieved simply by Appeals Officers clarifying what a requestor was seeking by way of information. This appears to be a reflection -- this is an editorial comment and I ask that you permit me to make it, just as a matter of general practice -- of a reluctance on the part of an institution when a request is made to contact the person who is making the request. There is certainly nothing in the Act that prevents that from taking place. If there is a legitimate need for clarification, I would think it is in the interests of all concerned, the institution who may not have to do unnecessary work without sufficient resources, as well as the person who is making the request who certainly does not need a lot of information that they were not even asking for. So, I would not encourage you in that sense but I would indicate that the Act clearly contemplates the ability to go out and clarify what a person is asking for and there is no need to, if you will, hole up as soon as a request is made and in fact, efforts should be made to clarify what is being requested.

The powers of the Commissioners, at both levels at an inquiry are quite similar. They include: the ability to require production of the record in issue; the ability to enter and inspect premises for the purposes of investigation; and the ability to summon and examine on oath any person who the Commissioner feels may have information relating to the appeal.

These powers are fully set out in section 52 of the Ontario Act. I would like to take a moment to indicate that one of the most important powers that the Commissioner possesses is that ability to inspect records. It is our opinion that in terms of the operation of our office, the ability to inspect a record is essential to the integrity of what the Commissioner does. I am going to talk, very briefly as we move along, of some of the unusual procedures that have to be employed when these issues are involved, but I would like to say that it is extremely important and it is our practice that we will ask the institution to provide a copy of the record or the record itself to the Commissioner's office when an appeal has been filed. The office then reviews that record.

There is no question of the Commissioner's office, on its own, would be disclosing any part of that record; that simply does not happen. I would like to say that just to simply try to put to rest concerns that may exist, thinking that the Appeals Officers or someone else in the Commissioner's office, as soon as they get the record is calling up the requestor and saying, 'I have the record here. Let's sit down and talk.' That does not happen. The record is treated in a confidential and secure manner. I would like to make that perfectly clear to put to rest any concerns that may exist about what we do once the record is in the office.

Briefly, once the appeal has proceeded through this mediation and investigation stage, the Appeals Officers prepare a report and we have very brilliantly called it an Appeals Officer's Report. This report sets out the Ministry's position in response to the request, the nature of the request, the reasons for appeal and the issues that have been identified as being relevant to the appeal. I think, again, I should emphasize that the identical report is sent to all parties. It is exactly the same report and they are advised that if there are other issues, other than the issues that have been set out in the report that they wish to raise, they are then free to do so. It is also the practice of our office, and I realize this is another area of concern, that if one party should raise a new issue which in fact is not set out in the Appeals Officer's Report, if the Commissioner considers that issue to be relevant to the decision that he will ultimately make, the Commissioner advises any other parties involved of that issue and provides the opportunity to make representations.

The matter of representations I think is the last point I would like to convey and what we have done by way of procedure is to employ the use of written representations in most cases, subject to special circumstances. Again, the ultimate cop-out, special circumstances, you know that when you see them. They arise. However, we have thought that these special circumstances would include things such as the ability of a requestor or appellant to commit their position to writing. People may feel uncomfortable with doing so. The other situation that we have encountered is if the issues are horribly complex or there is a great volume of material, that perhaps something other than written representations would be appropriate.

In conclusion, I share with John my opinion that it is too early to assess whether or not the power to make orders is preferable to the power to make recommendations only. I feel that there are pluses and minuses to both systems and to a large extent, the effectiveness of each may well depend upon the person who fills the position of Commissioner. In Ontario, the Commissioner has taken a very careful and considered approach to the Act and government institutions have been largely very cooperative with our office. There is a growing awareness across government that there have been basic changes in the area of access to information and that freedom of information is truly -- now, I'm getting an award for including this phrase in here, so, listen very carefully -- that freedom of information is truly the key to the 90s. Thank you.

John Grace

Thank you very much, Tom. Tom had a very informative and sensitive presentation. Now, Jim Rohman.

Jim Rohman, Staff Writer
Kitchener-Waterloo Record
Kitchener, Ontario

It is an honour and a privilege to be speaking to you today. I have been really impressed by the lineup of speakers and the quality of them and I have learned a lot from them and I am just a little farm reporter down the road from Kitchener-Waterloo but maybe I have some experiences that will be helpful to you.

I was really interested in the election last night and one particular aspect of it. Did you notice that Ray Hnatyshyn lost? I think that should be a warning to any Cabinet Minister that you do not ignore the unanimous advice of an all party committee. I began using the access system in the mid 1970s and we, of course, did not have an access system in Canada at that time. So, what I am referring to is the U.S. Freedom of Information system. Both the law and the people who administer it there are quite helpful and I was able to obtain documents to verify rumours that some of our Canadian meat-packing plants were in a rather shoddy state of repairs and I was able to obtain a report prepared by a joint team of Canadian and U.S. experts who delved into the issue antibiotics in animal and poultry feed.

During this period, I often tried to obtain similar documents from Canadian officials but without much success. The only appeal was to the good graces of the civil servants and from my point of view, they did not have very many good graces. For example, I was seldom able to get the meat packing inspection reports and the Health Department politicians never did release their copies of that joint report on antibiotics and then came the Access to Information law which was proclaimed on July 1st, 1983.

I might have been one of the first to take advantage of the system with a letter of request mailed June 20th asking for meat inspection reports for test results on feed and fertilizer and a few other things, all in one letter. I got much of what I requested in September and October of that year but not the meat inspection reports. They did not come until much later and, when they did, they were heavily censored. I suspect the censorship was applied jointly by the packing plants and the civil servants.

In any case, the censorship was applied with a big, black, heavy felt pen. Sometimes there were whole paragraphs that were black and often a page was more black than white and it kind of looked awful and we showed our newspaper readers how it looked, right on the front page. Naturally, I appealed that censorship to Inger Hansen and she persuaded the Agriculture Minister to lift most of the censorship but, under the Federal law, the meat-packing companies have an opportunity to appeal that decision and they did by going to the Federal Court, which is precisely what happened. I finally got those uncensored reports this September. So, it only took five years, a few months and a couple of weeks to get the reports. It helps to have patience and good lawyers and help from the Information Commissioner. Not all appeals take this long.

In August of 1983, acting on another tip, I filed for a special report on meat inspection -- problems in a Montreal area plant and I was denied and appealed to Inger Hansen and that report was released with some censorship on May 8th, 1984. So, from August until May. In May, 1987, when I asked for copies of the minutes of an advisory council to the Farm Credit Corporation, I was stonewalled with the unusual excuse that the chairman's position was vacant. Therefore, there was nobody available to decide and therefore the document should not be released. Inger Hansen's office persuaded the Farm Credit Corporation that it needed to find a different excuse, which it did. They have not released the documents to this day but I got them in a plain brown envelope. Now, that is another form of unofficial appeal that's quick and effective but seldom works.

I tried another homemade appeal process after I filed for some meat inspection documents in September of 1987. The company and the Federal officials said the incident did not happen and the documents did not exist. So, I telephoned the Federal official in Ottawa and I told him I thought he was lying and I thought I would publish the information on the basis of the interviews with people who work at the packing plant and, lo and behold, they found the documents and I had them later that week.

I have launched a number of appeals that I consider to be relatively minor, such as appeals about the lengthy delays and hefty fees but one of these appeals proved to be quite useful to one of my colleagues. He was seeking information from the Department of National Defence and he was told that it would cost about $25 thousand and he appealed to Inger Hansen and that estimate was reduced to about $2 5 hundred and then when they actually did the computer search and sent the documents, the charge was $250.00 which we paid.

We have lost some appeals. One of the most frustrating was an appeal for a list of the scientific research tax credit projects and we did not ask for the names of the tax paying companies and we did not ask for the amounts involved, we just asked for a list of the companies and the projects that were funded through the tax credits. In other words, we wanted the spending side of this government program, not the confidential tax filers side. We were denied on the basis that this is confidential taxation information and I do not believe it is. In fact, I believe that this strikes at the very heart of the British democratic system and the old, old battle that took place to gain parliamentary control over the spending of money. I have a few appeals still in process. One is for an international report critical of a genetic resource bank in Ottawa. I got the report through another source and we published the information in the newspaper. Yet, the government is still denying release. Inger Hansen is investigating.

Another appeal involves a report prepared by the Auditor General. Agriculture Canada has refused to release that. The Auditor General is not covered by the Act but Agriculture Canada has refused to release it arguing that the information will be published within 90 days. I do not believe it will be published in 90 days and I filed a formal complaint with Inger Hansen and I am waiting for that 90 day period to expire on another and similar request and if, as I expect, the report has not been published, I will appeal that one. That other one there deals with a sensitive issue on Free Trade and I think it is being hidden or held for the 90 days so that it cannot be used or will not be an embarrassment to Mulrony's government at the GATT talks in Montreal on December the 6th.

So, these are some of my experiences. Now, let me suggest some lessons we might learn from these situations. Number one, if you are an Access Officer, do not use a big, black felt pen and second, if you are applying for Access, have patience. The process is slow and Inger Hansen has been cautious but the rewards for patience have been great. In the case of the meat inspection reports, we now have a legal precedent that will serve as a guide to the future and I think the most significant part of this to me is that the inspections are conducted in the public interest. Therefore, the public has a right to see the documents which will help them determine whether this is being conducted in a very effective public interest. This issue of public service seems to be hard to get through to public servants and politicians. They seem to think that this is their information. That they are in power, they are kind of a power to themselves.

A third lesson is that if you are a third party company in one of these cases and you do not want information to be released, be prepared for a long and costly fight on the Federal level and be prepared to lose, not just the court case but a lot of face with the public, which will wonder what you are trying to hide and once the case is over, be prepared to have the reporters dig through all the documents and the arguments you presented to the court. And a fourth lesson is the absolute importance of court review. Politicians and businessmen and civil servants have many, many reasons for wanting to maintain secrets, most of them having to do with power and image. They very seldom refuse to release information on the basis that to do so would not be in the public interest.

Ontario thinks the Ombudsman approach will be effective. I do not. The Ombudsman I think will or will soon become too close to those in power and will end up thwarting and not serving the public the Act is intended to serve. I prefer a court system. It has been developed over centuries and it has served us well. It should be used here. I think my experience demonstrates the importance of being aggressive, of using the office of the Information Commissioner and of using the courts. Others deserve credit because a lot of them have been a lot more aggressive than I have or the record has been and they worked over a broader front. I think in particular of the Ottawa Citizen.

Let me finish with a couple of examples of how the system even though it seems slow can end up being extremely effective. Kevin Cox of the Globe and Mail and I were frustrated for a long time, several years, in our attempts to get at information surrounding import permits for eggs and chickens and turkey. So, both of us were eager to use access to information as soon as it became law and to test this refusal. Faced with the law,the civil servants reversed their position and released the information and when we both published our information, the poultry industry found the information so valuable that the civil servants were persuaded that they should not only release the information but that they should publish it on a routine basis, which has been done ever since.

Another example is quality testing in the feed and fertilizer industry. When I obtained the Agriculture Canada documents, they showed that between 25 and 30 percent of the samples flunked the Federal standards and both the industries and the governments were embarrassed into cleaning up their acts and the data is compiled into annual reports now which are freely available, to the public and besides, farmers got interested when they saw the data and so, the standards and the testing and the enforcement have all been overhauled. If you wish, in the question period, I can provide other examples where release of documents has had a salutory effect, cases ranging from the Canadian Grain Commission to the travelling expenses of the former chairman of the Canadian Dairy Commission and I might be persuaded to tell how the Ontario Ministry of Agriculture and Food has, in my view, abused the new provincial system in a couple of cases. Thank you.

Tom Wright

Just one point to make it clear. You, I think, may have said or made reference to the Ontario system and the word Ombudsman. Clearly that is not what Ontario has. We have quite the opposite. We have an independent commissioner who is appointed for a specific term with the power to make orders as opposed, I suppose, to the need to go on to court. Just to make that clear. There is certainly nothing in the Ontario Act that is akin to the Ombudsman role.

John Grace

Thank you for that clarification. You wanted to respond?

Jim Rohman

No, that's all right.

John Grace

I think it is just terminology. I think we all understand. Yes, would someone like to grab a mike? Good.

Christine Stollard
Agriculture Canada

Just to share ----

Jim Rohman

This is a set up.

Christine Stollard

Just to share information with everybody here, just to let you know we do have 93 meat packers who have appealed to the court for access to '84, '85, '86, '87, '88 meat inspection reports. Something to look forward to, I guess. In maybe five years, we can release those also.

Jim Rohman

Okay, good to meet you, Christine.

John Grace

She is the user of the black pencil. Try a marker next time. Does anyone else want to make a comment?

Charmaion Chaplin, C.S.E.

Mr. Rohman, I was just in the session a little while ago about whether journalists did or could use the Freedom of Information Act and I think your example here and the way you have used Freedom of Information legislation is a very good demonstration of why other journalists have trouble with it. This is not a matter for trivial fooling around to make little bits of money. It is a pile driver, not a tack hammer and this kind of legislation is not for people who want to make a little sensation for the six o'clock news and I wished we had heard your submission a little earlier. It would have made some very provocative discussion.

Jim Rohman

I think it is to make the little sensations on the six o'clock news because little sensations on the six o'clock news is what the public out there is interested about, you know.

John Grace

Well, that is not one I am going to get into. I will tell you that. Yes, someone coming up to the microphone. Last comment, please.

Mindy Ginsler, Manager
Freedom of Information and Library Services
Ontario's Ministry of Agriculture and Food

Don't panic, it is not a question for you, Jim, it's for Tom. There has been a lot of emphasis to date on the mediation process but, as a coordinator, it seems to me that so far the emphasis has been placed on the investigative aspect of the mediation process and I am wondering if the Commissioner's office anticipates in the future if there will be a heavier emphasis placed on the negotiation aspect of mediation?

Tom Wright

I think, Mindy, as far as our experience is concerned, the sense that we have is that to facilitate a negotiation or settlement that people really seem to want to know what the Commissioner is thinking before they are prepared to get involved in negotiation and certainly, I agree with you that what we have tried to do to a large extent is to make orders that give that sort of guidance which we anticipate will make the ability to settle far easier. I wish I had the statistics that show how many appeals we have been able to resolve. We have resolved, I understand, in excess of 52 percent of the appeals that were received and a large number of those, and I am speaking simply from memory, were resolved by way of settlement. So, it is certainly not our intention to look at orders as being the means by which we do our job. In fact, I think it is a simple fact that if we operate with 300 appeals as a minimum, the Commissioner's office simply does not have the ability to issue the volume of orders and settlement becomes a necessity and it certainly is something that is going to receive further attention and emphasis from the office.

John Grace

Okay, last question.

Lisa Philp, Coordinator
Freedom of Information and Privacy
Ontario Hydro

As a coordinator, I also have a question about the appeal process and that is, the Appeals Officer's report as you called it, comes out basically at the end of the mediation process and that, for most of us, is when we find out what is really being appealed. What we do is we get a notice saying that we have an appeal from a decision dated such and such. That decision, that notice could involve a number of complex things, anything from fees, to time extensions, to your final notice and any combination of those. Even if you know, even if it only dealt with one issue, for instance, denial of access or partial access to a document, there are no details in the notice that comes from the Commissioner's office to say what angle is being appealed? What portions? What the other person's case is. Now, I know you cannot give that in any great detail at that point, but it is very difficult to negotiate something when you really do not know what is being appealed until after the negotiation process is supposedly finished. Would you have any comment on that?

Tom Wright

I would say firstly with respect to the ability to advise as to why the person is appealing or what the person is appealing, in our initial notice very often what we receive is, to put it fairly, does not contain a lot of detail. Words, such as "I appeal", I do not think would be of a tremendous amount of assistance to any coordinator with respect to what is involved and that is why certainly, as far as I am aware, one of the major functions of the mediation and investigation stage is to clarify for all involved, both the requestor as well as the coordinator, what it is that is being appealed and try to centre on the issues that are relevant in that particular appeal and quite frankly, it is a surprise to hear you say that it is not until the Appeals Officer's report is actually in your hands that you would not know. That certainly is not the practice that I feel we have in place. If it has happened in a particular situation, I can say it should not have and we certainly feel that you should be aware of what it is that is in issue. Again, if nothing else, it may open up further avenues to settle and I see it as being an essential element of being able to settle. I agree with you completely.

John Grace

Thank you, Tom. Obviously, this session is of great interest to people. It has been a working session, we could go on and on. So, I think I am going to have to be sensitive to our time problem and thank you all for being so attentive and on your behalf, the panel for being so helpful.

Wednesday
November 23, 1988

Theme: Privacy Issues

EMERGING PRIVACY ISSUES

Valerie Sharp, Executive Assistant
Office of Ontario's Information and Privacy Commissioner
Toronto, Ontario

Good morning! Welcome to the second day of the conference.

My name is Valerie Sharp and I am Executive Assistant to the Information and Privacy Commissioner for the Province of Ontario, Sidney Linden, who is our keynote speaker this morning.

Sidney Linden has had a varied and interesting career in his twenty-two years at the Bar. He has been a criminal lawyer, a labour relations arbitrator, an author, a teacher and, always, a defender of civil liberties.

He has also been an innovator in the administration of justice in Ontario and, among other contributions, can claim three "firsts". He was the first Public Complaints Commissioner for Metropolitan Toronto. He was the Executive Director of the first prepaid legal services plan ever established in Canada and, now, he is the first Information and Privacy Commissioner for the Province of Ontario.

Under Ontario's Act, it is his responsibility, as Commissioner, to continually balance the competing interests of access to information and protection of privacy -- however, as this second day of the conference is devoted to the issue of privacy, Mr. Linden will, for once, concern himself exclusively with that issue in his remarks to you this morning.

Please join me in welcoming your keynote speaker, Sid Linden.

Sidney Linden
Information and Privacy Commissioner/ Ontario
Toronto, Ontario

Good morning, ladies and gentlemen!

It is a great pleasure for me to be here today. I want to begin by congratulating the Chairman of Management Board of Cabinet, the Honourable Murray Elston, and his staff at the Freedom of Information and Privacy Branch for the excellent work that they have done in organizing this timely two-day conference.

Now that Ontario has its own freedom of information and privacy legislation, conferences like this one will, I hope, become regular events. I welcome them for the educational role they fulfill. In my view, the wider the understanding of freedom of information and privacy issues, both inside and outside government, the better the Act will work for all concerned.

I also welcome the participation of so many distinguished speakers and panelists, including Inger Hansen and John Grace, respectively, the Information and Privacy Commissioners of Canada. I would also like to mention Mr. Justice Horace Krever, of the Supreme Court of Ontario. I'm sure you'll remember that it was the "Krever Commission" into the confidentiality of medical information that alerted us to the vulnerability of such information to unauthorized access. The list of notables does not end here, though, I hope, you will forgive me if I do not mention everyone by name. The participation of each and every one of you is most welcome!

This conference is certainly timely. In just a few short weeks, Ontario's Freedom of Information and Protection of Privacy Act, 1987 will be a year old, and so it is appropriate that we pause a moment to reflect on just what it is we have been trying to achieve.

Usually I wear two "hats" as Information and Privacy Commissioner, but this morning I will only be wearing my privacy "hat" as I would like to talk to you about "privacy" and the difficult task facing those of us who are trying to define and protect it.

Let me begin by taking you to the "mother of all parliaments", the British House of Commons, where the members are listening to a debate on "a bill for taking and registering an annual account of the total number of people, and the total number of marriages, births, and deaths; and also of the total number of poor receiving alms from every parish and extra-parochial place in Great Britain."

The journal of parliamentary proceedings records the following statement to the speaker by Mr. William Thornton, M.P.:

"Sir, I was never more astonished and alarmed since I had the honour to sit in this house, than I have been this day: for I did not believe that there had been any set of men, or indeed, any individual of the human species so presumptuous and so abandoned, as to make the proposal we have just heard... to what end... should our number be known, except if we are to be pressed into the fleet and the army, or transplanted like felons to plantations abroad? And what purpose will it answer to know where the kingdom is crowded, and where it is thin, except we are to be driven from place to place as graziers do their cattle? If this be intended, let them brand me at once; but while they treat us like oxen and sheep, let them not insult us with the name of men. As to myself, I hold this project to be totally subversive of the last remains of English liberty..."

You should know that Mr. Thornton registered this impassioned protest against the census on March 30, 1753. If Mr. Thornton found the collection of what we today would consider a minimal amount of personal information - an annual head count and registration of marriages, births and deaths - to be subversive of his English liberty, what would he think of members of a society that routinely, without question, hands over to their government the kind of information that we routinely give on our census forms, not to mention our income tax forms and the kind of information that we routinely give to the private sector on any application that we make for consumer credit.

By this time we all know how easy it would be to create an astounding dossier of information on each and every one of us from the personal information that resides in government and private sector data banks. Information is collected about each of us from the moment we are born until after we are dead and our estates are being probated. Far from fulminating on soap boxes about the subversion of our liberty, we recognize the value of government collecting census information to predict social needs, we recognize that the government needs information on our financial affairs to allow it to collect revenue in order to finance these social programs and we recognize the value and efficiency of using "plastic" instead of cash to get us from payday to payday. But just think for a moment about the kind of information you could get about someone if you had access to their bank and credit card records alone. You would be able to track them easily - exactly what comes in and exactly where it goes, down to a list of their favorite restaurants and maybe even video rentals.

Attitudes have changed a lot since 1753, and that's one of the reasons why "privacy" is a concept that is so hard to protect - because it is so hard to define. We would all - or at least I think we would all - be offended and feel that our privacy had been invaded if we learned that an unauthorized person had access to our tax records or medical files. But are we all offended to learn about various levels of government sharing personal information, stored in government data banks, to discover and apprehend welfare frauds, or tax cheats, or delinquent spouses who haven't made any maintenance payments? Is invasion of privacy like one jurist's definition of pornography? - we can't tell you what it is, but we know it when we see it?

It is extremely difficult to defend a line that is constantly changing. Further, the line is constantly being pulled from both sides by the needs of "efficiency" and our need to protect ourselves from that queasy feeling we get when we believe that someone has gone too far and crossed over the line.

Intrusiveness is becoming pervasive in the latter half of the 20th century, not only regarding our personal information, but also regarding our private space and our physical persons. We may well be on our way to institutionalizing invasiveness. Professor David Flaherty has warned that "we run the increasing risk of becoming, or may already be, surveillance societies...".

In 1988, we note that the Government of Canada plans to extend the use of Social Insurance Numbers for tax collection purposes, a computer-matching law has been passed in the U.S., the Government of Ontario has over a thousand personal information databanks and there are some 1,016 powers of entry found in Ontario statutes, computers are routinely used to monitor workers' output and Ontario has decided to join B.C. and experiment with "electronic cuffs" for low-risk offenders instead of institutionalizing them.

Governments, and private sector organizations, have had, do have, and by all accounts, will have an enormous appetite for collecting personal information about us. The collection, use and dissemination of all information, including personal information, has become the oil that keeps our political and economic systems running smoothly.

We are entering, if we have not already entered, the "information society", that makes information, including personal information, a commodity of exchange. Governments want it, businesses want it, everybody wants it; and everybody is prepared to go to great lengths to get it. In fact, the acquisition of your personal information or mine is becoming easier and cheaper compared to any time in the past.

The practical application of the advances of micro technology and other scientific innovations has created an infrastructure for exploiting the full capabilities of information technology. And what is one of those capabilities? - A recorded profile of the public and private life of every individual, capable of being accessed by anyone with a computer terminal and a telephone jack.

Although 1984 has come and gone, we may well be facing the prospect of an "Orwellian" society, but when it comes, don't worry, it will be marked "user friendly".

If all this sounds a bit alarmist, you should read the latest annual report of my colleague Federal Privacy Commissioner, John Grace. He praises "the difficulty of keeping privacy protection ahead of technology..." and wonders whether the Federal Privacy Act has the sweep and powers to deal with some of these new threats and challenges. He goes on to say:

"It is hardly conceivable today that a democratic country would not control the use of personal information which its government collects from individuals in ever-increasing amounts. The new privacy threats are so explosive, so unexpected that a single code probably cannot be written to cover them."

Let me give you an example of what he, and all of us, is faced with. In 1987, the Federal government acknowledged that:

"Canadians do not want the (Social Insurance Number) SIN to become a universal identification number and will act to prevent this from happening. As an immediate first step, the government will put its own house in order".

That's what they said they were going to do, but what have they recently done?

As part of its tax reforms, the Federal government now requires that everyone with a bank account or everyone who buys Canada Savings Bonds must give his or her Social Insurance Number to the financial institution they deal with.

As one Federal minister has pointed out, "The SIN ... is in itself hardly a menace to privacy. Rather, it is the continual expansion of the use of SINs in public and private bureaucracies that poses the threat to personal privacy." Originally, the SIN was developed for use with two federal acts. This was expanded to another seven, and then a dozen, and now even more have been added.

When our "Orwellian" world arrives, it will not be ushered in on the crest of a revolution organized by technocrats, as it was envisioned by H.G. Wells. Rather, it will come piecemeal, gradually, incrementally. As each new advancement in technology opens up new applications, sound reasons will be given as to why such applications should be exploited to the fullest extent. Such technological innovations will undoubtedly bring many blessings and conveniences, which we all welcome, but we must never lose sight of the larger "tug of war" between increased efficiency on the one hand and the potential loss of our privacy rights on the other.

We must keep informed of the potential negative consequences of technological advances, and we must be prepared to be critical when we identify these potentially negative consequences. We have a responsibility, and the public has a right to expect, that those of us who are directly involved in the administration of legislation to protect privacy rights will adopt a critical, but responsible, stand on these questions and issues.

There is evidence to suggest that the general public is becoming more sensitive to the privacy implications of technological gadgetry and other forms of modern day intrusiveness. Many recent polls have indicated that intrusiveness ranks as a major social issue in our society. At the beginning of this year, Decima Research conducted a poll on our behalf into the public's awareness of privacy and access issues and where their concerns lay. Ninety-four percent (94%) of the sample we polled indicated that their individual privacy, that is, the protection of their personal information held by the government, was important -- 73% felt it was very important. Three-quarters of the sample said that protection of individual privacy was more important to them personally than having the right to access government information. Furthermore, a separate Decima quarterly poll conducted in March of 1987, found that the majority of Ontario residents (71%) were concerned about the confidentiality of personal information collected by the Provincial government. More so than information collected by other institutions. One of the main factors which appeared to be driving such donations relates to computers; the majority (77%) believed that "as long as information is stored on computers, we can never be sure of our guarantee to privacy".

The message the public is sending is that its concern is real. What's more, the message has been received, as evidenced by the fact that, at least since the late 1960's, privacy issues have found a secure place on the political agenda. In Canada, the Federal government, Quebec, and now Ontario have passed privacy protection legislation. These governments should be commended for their legislative responsiveness, but we must remember that privacy issues cannot be resolved by legislation alone.

The interesting question is always, where is the line and how do we know when we've crossed it? Which intrusion or intrusions do we believe are unwarranted or unjustified invasions of personal privacy.

I suspect we may all have some difficulty in making our choices. Furthermore, our choices may not all be the same. Our dilemma turns on the issue of the appropriate balance between protecting personal privacy and permitting some level of intrusiveness for the sake of some larger public goof or public interest. Achieving this balance depends on having some clear notion of what constitutes privacy and what value we place on it, as opposed to what the larger public interest is and what value we place on it. This is complicated by the fact that privacy is so difficult to define, and that we can't give it an absolute value. Moreover, the larger public good, whether we call it the "public interest" or something else, is just as difficult to define.

How can we decide these questions? How do we make the judgement as to which of the competing claims of privacy and efficiency or "public interest" wins out?

In 1890, Mr. Justice Brandeis of the American Supreme Court defined privacy as "the right to be left alone". While that may not be the most comprehensive or useful definition around, set against the circumstances of our daily lives, that simple definition may help us to examine our own sense of what privacy is. I like the analogy between privacy and an elephant: When you first encounter one, you may have some difficulty describing it, but you sure know it's there.

Defining privacy or knowing what it is - considering that it's changed somewhat over the years - is difficult enough, but assuming that we know what privacy is, an even more difficult question is - how do we go about protecting it?

There are a variety of approaches that have been adopted, or that could be adopted. There is the "lets leave it to the individual" approach, whereby governments legislate a set of rules and procedures regarding informational privacy, then leave the burden of monitoring and ensuring that governments abide by those rules and procedures up to the individual. This is the approach favoured in the U.S. The difficulty with this is that a remedy is provided only after a misuse has been detected. Moreover, this approach places a heavy onus on the individual who is really no match against a government institution, which may be deciding whether that same individual should receive employment, a loan, a grant, or some other benefit.

There are many in the U.S. who have recognized the limits of this approach and who have proposed the creation of a Privacy Commissioner or a Data Protection Board. However, the American reliance on rugged individualism and on the courts to solve all problems is well known - and so is the fact that their court system is severely overburdened and straining under the weight. While we don't always agree with the Americans, I believe that there is much that we can learn from them. Some of us here today recently attended the annual meeting of the American Society of Access Professionals in Washington, D.C., and I believe continuous ongoing contact with Americans in this field is very useful.

This leads us to the next approach, best illustrated by the European Data Protection Inspectorates. Under these schemes, informational privacy is protected by requiring everyone in the private and public sectors to register with their national inspectorates if they have access or use personal information. Data users are expected to abide by certain standards of conduct when using personal information. Failure to comply may result in a denial of registration or in deregistration. In my view, these systems were conceived when the world was a much simpler place and they do not always work the way they are supposed to.

Generally speaking European data protection legislation gives a right of access to personal information by individuals, and the right to complain if their personal information is misused, but the individual is not expected to carry the sole burden on monitoring how data users are complying with the approved standards and practices. The independent data inspectorates have been created as privacy protection watchdogs and their principal function is to monitor the use of personal information. I recently attended a conference of these data protection agencies in Oslo, Norway and learned how some of them operate -- one of the more respected agencies is the one in Weisbaden, West Germany under the direction of Commissioner Spiros Simitis and I had the pleasure of meeting with the Commissioner there and discussing his system.

A third approach is the Canadian model, although I should point out that Australia has just introduced new legislation at the federal level which proposes a very similar model so, perhaps, this model should now be called the Canadian/Australian model. Our approach does not follow the European system of registering personal information users in both the private and public sectors. Our systems do give the individual the right to see his or her own personal information, to ask for its correction, and to complain about government practices or procedures that do not comply with the Act. Generally speaking, these rights are common to all privacy protection schemes. However, the Canadian/Australian model, recognizes the limits that individuals have in single-handedly trying to ensure that the rules set out in the Act are being followed, and accordingly has created an independent office, modelled on the ombudsman concept. This independent agency has the responsibility of ensuring accountability to the public on the use or misuse by government agencies of personal information.

Ontario's Freedom of Information and Protection of Privacy Act, 1987, gives the office of the Information and Privacy Commissioner some very broad responsibilities.

For example, the Commissioner has an oversight function which allows him to comment on the implications of proposed legislative schemes or government programs; he may also make assessments of the extent to which government institutions are complying with the Act, and make recommendations regarding the practices of particular institutions.

The Commissioner can order an institution to cease a collection practice, and destroy collections of personal information that contravene the Act. Moreover, in appropriate circumstances he can authorize the collection of personal information otherwise than directly from the individual concerned.

The Commissioner also has a public education function and can conduct public education programs; he can conduct research on privacy issues, and finally he can mediate, hear appeals and issue binding orders regarding specific complaints about the misuse of personal information.

There is no doubt that the Ontario legislature intended that the Office of the Information and Privacy Commissioner have the tools needed to deal with privacy issues as they emerge.

Obviously, the Commissioner's office isn't able to perform in a vacuum. We must have the cooperation of the government and of the legislature, and we must be sensitive and open to the concerns and expectations of the public. There has to be a dialogue in which the competing and sometimes evolving interests and values that are integral to privacy issues are explored, assessed and ultimately resolved. It is indeed a challenge!

What sort of privacy issues can we be expected to have to deal with in the foreseeable future?

A recent article in the U.S. magazine Business Week claims that "after health care, privacy in the workplace may be the most important social issue in the 1990's". This concern is not limited to the U.S., nor only to the private sector.

Intrusiveness in the workplace comes in many forms. Computer terminals may speed the way information is handled, but they can also be used to create employee productivity profiles by tracking phone calls, monitoring the progress of projects, and by tracking the rate of data entry. Those doing the monitoring no longer have to look over your shoulder. By adding video cameras and linking the computers in an inter and intra-organizational network, surveillance can take place from just about anywhere and it can take place surreptitiously. Not surprisingly, employees resent such surveillance, and ask - whether the right of privacy should be limited to our private lives, or is it a right that is just as valid in the workplace?

Considerations of efficiency are generally the underlying motivation for much of the intrusiveness in the workplace. When various layers of government seek to lower their public expenditures, and businesses seek ways to cut costs in order to stay competitive, privacy of employees is often the first value to fall by the wayside. Its intangibility makes it vulnerable to being overridden by considerations that appear to have hard facts, or hard numbers, behind them, especially when those numbers are preceded by dollar signs. We must be eternally vigilant and constantly ask ourselves whether the value represented by efficiency should always prevail. Whenever possible, we must strive to find a way that allows both of these important values - efficiency and privacy - to coexist.

Privacy in the workplace is also being affected by the use of polygraphs to determine employee trustworthiness. Such testing is often done before an employee is hired, with the aim that such testing will act as a deterrent to potential thieves. The U.S. Congress recently passed a law limiting the use of such tests to actual cases of theft.

There is also an increasing use of urinalysis to test for drug use, and there have been instances where companies have sought to screen employees for genetic abnormalities, ostensibly as a service to the individual, but in reality to avoid hiring someone who will become a medical and insurance liability.

AIDS testing is an issue that spills over from the workplace and affects all facets of a person's life. Various medical authorities have argued against the use of compulsory AIDS testing, but the issue has definitely not been put to rest. Recently, CTV's Sunday public affairs program "W5" documented the use of such compulsory testing of municipal employees in the Town of Longeuil in Quebec. Apparently, the town council is fearful that one of its employees may have AIDS and, as a consequence, will incur huge medical bills that the town will be obliged to pay under its collective bargaining agreement.

In California, the issue of compulsory AIDS testing was placed on the ballot in the recent federal election, though happily it was defeated.

Our privacy is also vulnerable from attack from other governments and international businesses, and our domestic legislation will, unfortunately, not serve as a shield from these potential abuses. We can reasonably expect that personal information will travel across borders via telecommunications satellites, as various businesses and governments extend their international data networks. In its report, "Open and Shut", the federal standing committee on justice (and the Solicitor-General) stated that "personal data on Canadians is routinely being transferred and stored outside of the country by federal or provincial governments and the private sector." Companies, for example, may find it attractive to send personal information to countries where there is inexpensive labour to input the data, or where the laws are less stringent as to how personal information is stored and used, to "data havens" as they have been called.

This possibility has prompted the Council of Europe to ask that its member countries establish uniform codes of fair information practices to ensure that no one member country becomes a data haven. That's fine as far as it goes, but what about countries that aren't members of the Council of Europe or a similar organization with similar goals and privacy values?

At present, various levels of government in Canada share personal information relating to law enforcement matters (C.P.I.C., and "law enforcement" defined in the broad sense). Recently, the Ontario government announced that it is considering entering into an agreement with Quebec, other provinces, and possibly even the State of New York, whereby information about traffic violations committed in each others jurisdictions will be transferred to and become part of your driving record where you live. It is also possible that personal information from one's driver's record will also be transferred. We must keep in mind that eight out of the ten provinces do not have specific legislation covering the protection of personal information in the public sector and what these provinces do with the information when they receive it and how they deal with it is not regulated to the extent that it is in the provinces of Ontario and Quebec.

As you probably know, computer-matching is the linking of separate databases by using a common identifier. For example, an individual's social insurance number can be entered into several unrelated data banks. The retrieved information can then be compared to see if there are any anomalies or "hits" to use the American expression. In the U.S., the federal government has used this procedure to link income tax returns of individuals with their welfare claims, to check for welfare defrauders. When first used, anyone found by the computer to have received welfare benefits to which they were not legally entitled, were immediately denied any future benefits. There were no face-to-face discussions with the individual to explore the possibility of an error in the database or to ascertain whether or not they were dealing with the right person. If the computer said a fraud had been committed, the matter ended. There were no due process safeguards in place. The unfairness of this approach was clearly, and quickly, evident.

This year, the U.S. Congress passed the Computer-Matching and Privacy Protection Act which provides a legislative framework for all computer matching by the federal government. The legislation sets out standards of fairness for how individuals are to be treated and a code of practices that must be followed. However, the oversight of these computer-matching practices remains with the government and there is no independent audit function incorporated in the Act. On a recent visit to the U.S. I learned that once the due process safeguards are in place, the expected financial saving from computer-matching may no longer exist.

Under the Ontario Act, the issue of computer-matching is dealt with, to some extent, by section 59, which gives the Commissioner the power to order the cessation of a collection practice, and the power to authorize the collection of personal information other than from the individual. The Ontario legislature appears to have had great foresight in dealing with this issue and in giving this power to an independent agency.

While the SIN is clearly a federal device, under our system of shared federal and provincial responsibilities, it is also used by provincial governments. It is quite conceivable that provincial governments could use the number independently of any federal/provincial agreement or program, resulting in the SIN becoming a national identifying number, not as a result of federal action, but as a result of provincial action.

The federal Privacy Commissioner has warned us about the dangers of Canada adopting the SIN as a universal identifier. I concur in his concern in this matter, as in other matters. It is my aim and objective to work closely with the federal Privacy Commissioner as well as the Quebec Commissioner in identifying issues of mutual concern, and in developing positions we can all support.

I have pointed out some of the privacy issues that I expect we will have to deal with in the foreseeable future. Clearly, my comments do not exhaust the range of matters that could be discussed.

The role of the private sector in protecting individual privacy has not been mentioned for the obvious reason that privacy legislation in Canada extends only to the public sector. Needless to say, if we are going to be serious about privacy protection the private sector will have to be drawn into our discussions. We will have to encourage businesses to take the public's privacy concerns seriously and develop codes of fair information practices.

As we head towards the close of this century, all of us are concerned about the kind of society we will live in.

There is no doubt that we will have at our disposal ever improving technologies that will make our lives much easier. We will probably enjoy a material quality of life unparalleled in human history. But, will we be able to preserve our privacy and other related individual, human and civil rights? Perhaps it is the ultimate lesson of human history that the struggle for human dignity and worth is ceaseless and un-ending, despite our scientific and material progress. Our society will ultimately be judged not on how many megabytes can be stored on a microchip, but on how we treat each other. Privacy is an imporbut on how we treat each other. Privacy is an important human value, it is one that we possess individually, and at the same time, share collectively. The question is how much of this important value do we want to preserve and at what cost?

The challenge for all of us is to move forward into an increasingly complex 21st century without surrendering this basic important human value.

Thank you.

Valerie Sharp

We'd like to thank Mr. Linden for his remarks this morning. We're going to go right into our sessions now. "Human Resources Management" is in this room and the session on the Legal Community and the Act is in the Elizabeth Room which is right across the hall. Thank you.

HUMAN RESOURCES MANAGEMENT AND PRIVACY

Carol-Ann Skey, Policy Advisor
Freedom of Information and Privacy Branch
Management Board Secretariat
Toronto, Ontario

Welcome to our session this morning. I am sure it is going to be an informative one for all of you. I welcome the guests, later I'll introduce you to each one individually. I am Carol-Ann Skey, Policy Advisor at the Freedom of Information Branch. Today, we will be talking about, during our session, the Human Resources aspect of the legislation and we will look at three things. We will look at, first of all, what has happened in the United States with regards to their legislation and human resources issues. We will take a look at how human resources will change and what the litigation aspects of it in terms of labour relations, human rights, etc. will occur and we will also take a look at what one group of institutions that will be covered as of January the first, namely the community colleges, are doing with regards to making changes to accommodate the Act within the institutions.

Now, the other sections of an institution we will be dealing mainly with, giving information and that is dealing with the access side of legislation. The human resources section, in most institutions, will be taken a look at. Also, giving out information but on the other hand, looking at what the administrative parts of the Act involve and deciding what to do with regard to secure and personal information. So, you've got two things going on in the human resources section in the institutions.

Now, I will introduce my panel so that we can get started with the discussions today. First person on my right is Mr. Evan Hendricks, who is the editor and the publisher of Privacy Times, which is a United States, Washington-based newsletter that covers Freedom of Information and Privacy both in Washington, the U.S. and Canada. He has written on Freedom of Information and Privacy for ten years and he is published, as well, in the Washington Post. He has authored a basic sharing of what the American public has learned, what their legislation has done, and he is the past president of the American Society of Access Professionals and that organization will be sponsoring a conference in Ottawa next April.

Immediately on his right is Mr. Liam Rafferty, who is a lawyer with the law firm of Inch, Easterbrook and Shaker in Hamilton. Before joining that law firm, Mr. Rafferty worked with the Labour Law Council to the Regional Municipality of Ottawa/Carleton between 1985 and 1988. His practice focused on labour law litigation and he has appeared before Grievance Arbitration boards, the Ontario Labour Relations Board and in the courts. As a result of dealing with those aspects of labour relations, needless to say, he has a wide knowledge of human resources issues, namely pay equity, workers' compensation, human rights, employment equity, etc.

Immediately on his right is Jacqueline Robarts who is the president of Niagara College of Applied Arts and Technology in Welland. She has been in that position since 1978 and has the distinction of being the first woman to be appointed as president of a community college in Ontario. Prior to that appointment, she was the Vice President in charge of academics at Humber College of Applied

Arts and Technology. She is also a Registered Nurse with a Bachelor of Science in Nursing and she is currently a candidate for the Masters of Education Degree in Adult Education at the Ontario Institute for Studies in Education. She has held various positions on the Executive Council of Presidents since 1978, including the chairperson's position during the 1983/84 school year. She is currently a member of the Board of Directors of the Ontario Hostelry Institute and she sits on the Canadian Dental Association Council on Education and Accreditation. I will turn the microphone over to Mr. Hendricks, who will be the first speaker.

Evan Hendricks, Publisher
Privacy Times
Washington, D.C.

Thank you, Carol-Ann. I consider myself lucky for many reasons. An example is being able to come here during your elections. It was an historic election and I like elections, partly because so many great lines and philosophies are captured in the course of elections. I do not know if you remember in the 50s when Adlai Stevenson lost to Eisenhower in a very close race, he came out with sort of the profound thing that summarizes how we feel in many situations by saying, "I am too old to cry but it hurts too much to laugh". That is one that has carried me through life under a few circumstances. Nixon, in 1960, when he lost the close one to Kennedy, referring to some possible irregularities in Illinois ballots in the Chicago area, said, "Well, I told my daughter, Trisha, I don't blame Jack Kennedy for beating me in the election. I blame the people who counted the votes in Chicago."

It was also in the '68 election there was supposed to be a new Nixon and they said -- people who started picking up on this said, 'Yeah, there is a new Nixon and his name is Agnew", if you remember Spiro T. Something came out in this election, in your election, which said that -- it was on a poster, I guess or in the paper, it said that "George Bush wants a kinder, gentler nation and it is called Canada". That was a good one and then, "Turner - when your back is to the wall, you have to come out firing and of course, when Reagan came out endorsing the Free Trade agreement, Turner had to fire back something like, "Oh, great, we have the lame duck giving advice to a dead duck". But elections are always fun. Then, of course, we get the results.

In talking about human resources, I feel like an appropriate follow-up to Commissioner Sidney Linden's talk because I really want to talk about computer-matching. It is a topic you might not be intimately familiar with. It is something you should know about and it is important to know what the U.S. experience has been because we have really gone through a whole evolution of going hog wild with computer-matching and then possibly backing away from it and so, hopefully, in very important ways, our experiences have been taken into account in Canada. So, it became directly related to this year's policy that is being worked on in Ottawa, the U.S. experience in computer matching. To talk about it, you have to sort of sketch the rise of the welfare state in the U.S.

In the '60s, the United States could no longer hide its poverty, the slums that are next to gleaming office buildings and there was hunger and poverty. There was the book by Michael Harrington about "The Other America' which made quite an impact and then we had the race riots in several major cities.

The response by the Johnson administration was the "War on Poverty". Several institutions were created, the Department of Health, Education and Welfare, several programs: food stamps, AFTC as welfare, Aid to Families with Dependent Children, Medicare, Medicaid, Supplemental Security Income and the list went on. Many people were eligible. It grew quickly and before you knew it, the budget of Health, Education and Welfare was bigger than the budget of some national governments. A new industry, really, had been born.

By the late '70s, there was a backlash. The budgets continued to grow and you started getting the stories about fraud in the system. You had trafficking in food stamps by people who were also dealing, buying their drugs with food stamps and you had the Welfare Queens, driving pink cadillacs, often with matching pink hair and so, the conservatives wanted to use this to say, 'Well, let's roll back the welfare system.' Well, at the time the Carter administration was in power and Joe Califano was Secretary of Health, Education and Welfare and he wanted to tackle the issue head on. He was a lawyer, a representative of the Washington Post. He was a street fighter and had a real tough reputation.

To give you an example, he also had an antismoking campaign going on and some of you have heard this story but I cannot resist to tell it to you to illustrate the kind of guy Joe is. He was ahead of his time, fighting smoking and a Senator from Carolina, a tobacco state was giving him a hard time and saying, 'Mr. Califano, you are intruding into people's private decisions. You are trying to tell them how to live their lives and I believe, Mr. Califano, if you had your way, you would try to regulate sex.' And the whole room went quiet and Califano paused and he looked up and said, 'Well, we thought about that. Senator, but we did not know where to put the warning labels.' Well, this was the same Joe Califano that decided that he was going to take on welfare fraud and the FBI had tried out this technique of matching lists via computer, using the technology, to try and come up with people who turned up on both lists.

To try and illustrate the thing quickly, of what computer matching is, I will describe the first pilot project. They had the lists in the Washington, D.C. area of people who were receiving AFTC welfare. These are mothers that do not have a husband in the house and have kids and then they had the list of all the people who were federal employees in the area. Now, they matched the two lists, using the social security number, which is the key to the whole process. They matched two systems together and if they get someone on both lists, the theory is that someone, a federal employee is also getting welfare and they call it, when someone pops up with their social security number on both lists, you have 'raw hits'. Well, it was a great theory and they put it to work and they had thousands and thousands of names and they had lots of problems, partly because, let's say the welfare was a time period from January to September, the employment lists happened to be from April to December, so, they had some overlap and there were some cases where some women had actually quit welfare, notified the government and started working and still turned up as raw hits. But they whittled it down and they got 15 cases of welfare cheats -- they weren't interested in resolving the situation, they didn't go to the women directly and say, 'What's the situation? What is your side of the story?' They had a press conference and they waved their names in the public and it turned out a lot of these people suffered a lot of harassment and their kids were harassed in school. A lot of the women were completely innocent. There were situations where it was actually the government messing up and not their fault. They had notified the government. The cheques kept coming and the bottom line was that they did get taken to court and prosecuted and the judge threw out nearly all the cases. When you add up the fraud they were charged with, but not the fraud they were convicted with, it came to less money, about $100,000 less, than HEW had spent on its 25th annual birthday party. But the precedent was set.

On the other hand, the Carter administration came out with the national privacy policy and as part of that policy, they said, we are going to have computer-matching guidelines and the litmus test is you've got to be able to do a cost benefit analysis at least to show that the money you are going to save to the tax payers is enough to outweigh the privacy interests here. Now, in going through this process, the Privacy Act was supposed to prohibit this sort of mass sharing of data between the HEW which collected the welfare lists and the Civil Service Commission, which had the employment lists. Unless you had permission of everyone involved, -- the Privacy Act said you could only disclose for a routine use that was defined as a use compatible with the purposes for which the information was collected, which is really a fine standard because it is just supposed to cover those isolated, individual cases where you might have to do something to take care of a claim or something like that. But they stood this clause on its head and they basically were able to violate the spirit, if not the letter of the Act, and because we do not have a Privacy Commissioner or anyone watching the store, they got away with it. Plus it was for the purpose of fighting fraud.

So, they established the precedent and then, speaking of elections, 1980 came and the Reagan team came to town. Well, the War on Poverty sort of turned into a war on the poor and they wanted to cut back social spending and so, they took aim at a lot of these things and they really expanded the number of computermatching programs and they took away that requirement that you do a cost benefit analysis. That gave the Executive Branch agencies a green light, telling them, we want you to sit around and dream up more matching projects and they did and it got to be hundreds of matching projects and the agencies were shipping back and forth these massive computerized files of thousands if not, in a few cases, millions of people and again, it was for fighting fraud.

So, who could be against it? Privacy was sort of a nebulous issue and there is one example where they had the elderly, the blind and the disabled who were recipients of SSI, Supplemental Security

Income, and they wanted to match their tax data, income tax data or showing what they had earned on the outside to see if they had been telling the truth about how much income they were earning through bank accounts and things like that, but they could not because the tax privacy laws were so strong they prevented the disclosure of the information.

So, they sent these elderly, blind and disabled people, about four million of them, a notice saying, 'We want to check what you say against your tax records but we need you to sign this waiver. If you do not sign this waiver, your benefits may be affected.' A lot of them were scared and they filed suit and they actually lost in the first round but three years later, they finally won in the appeals court and then, at this point, Congress steps in and Congress starts approving matching on not only a federal level but for your purposes, on a parallel situation, and also, they created this whole federal/state network of matching wages, having a quarterly wage reporting, so, it would be available both on a federal and on a state level. Then, they passed another law saying the Social Security Number would have to be required for all needs-based programs so it would facilitate this matching. Well, there were vocal protests from a small privacy community in Washington and it just shows, after all these years, ten years of this, and it finally paid off. This year Congress passed a privacy protection act for computer matching. It requires due process. It requires independent verification of "hits." It gives people a right to a hearing and it also requires a cost benefit analysis in the legislation and that way, the Executive Branch cannot remove it, as they did before.

The cost benefit thing is very important to understand because when this first thing started, the Inspector Generals -- there is a community in Washington where they are supposed to watch out for fraud and abuse. They are sort of like the "Inspector Clouseaus" of fighting fraud -- they estimated there was a billion dollars in fraud. Well, last year or two years ago, in their testimonies they said there is still, after all this computer-matching was supposed to solve all sorts of problems, there was still a billion dollars in fraud. It is just the magic number they keep coming up with. And then, they did a study of their best program out in California for fighting fraud and they said that they had great experiences because they had case workers with investigators and they were looking over cases and there was a little line at the bottom which said the automated screening, i.e. the computer-matching, was only catching 12 percent of the fraud cases. Why? Because if you are really going to cheat the system, you are not going to put your Social Security Number in the same union -- you are going to figure out how to beat the system.

Why is this relevant to Canada? Because in Ottawa this year, John Grace, the Privacy Commissioner had talked a lot about computer-matching and he wanted to do something about it. He had me pull all this information together, a study of the U.S. experience so he could take it into account in recommending a policy on computer-matching to the Treasury Board. The Treasury Board has accepted a lot of his recommendations. It is not finally approved yet but I understand it looks good and it looks like Canada will be able to learn from the U.S. experience. The item today about the SIN matching for banks, I think, is going in the other direction. Maybe you'll be able to do something about that later. It looks like, at least, there might be more controls on it and that experience could filter down to Ontario.

Thank you very much.

Liam Rafferty, Lawyer
Labour and Administrative Law
Inch, Easterbrook and Shaker
Hamilton, Ontario

Good morning. When I was asked to speak at this conference back in June or July of this year, the person who made the request was Steve McCann and some of you may know Steve McCann already. He is connected with Carol-Ann's branch. Steve and I had spoken at a conference at the Canadian Bar Association and the subject that I addressed was whether you as -- in the event that you are a manager or a person giving an employee reference -- can be sued by your employee because of the comments you made in the reference. I think that was probably in large part why Steve asked me to come today. However, that is really only an incidental subject in the discussion, although I will touch on it in the end because the issues of disclosure do give rise, I think, and fairly, to a concern about what happens when people get a hold of the nasty things you were writing about them. Or if you are a person who has had the nasty things written about them, what do you do? The second thing I might say, just by way of introducing myself is that I have the privilege today of addressing an old professor, who I see sitting just about six rows back.

David Flaherty is there and I suppose everything being circular, that's what it is and so, today, he gets to listen to me, although for a considerably shorter period than I was on the receiving end of.

One of the rules of the law and rules that lawyers have hammered into their head and I am sure there are lawyers in the room today, you can vouch for this, is that when you are addressing anybody, be it a judge, a jury or an assembly of people, you tell them what you are going to say, you say it and then you tell them what you said. In large part, I have found that to be suitable guidance. Again, I think, referring to David Flaherty, he might agree with me that you really have to hammer home two or three essential points to get the message across.

When I first read this Act, my impression was why I was being asked to speak because initially I felt, "Well, this doesn't change anything" and I think, in large measure, I approached the discussion with that thought in mind. As I was preparing my remarks for today's seminar, I found on second review that like most things, there is more to this Act than meets the eye. But I would like to say, as a general and introductory remark for all the people sitting in the room who have had a chance to go through this, and it's pretty weighty stuff, as a general and a fair comment, the situation is really no different than it has ever been except now we have a code that formalizes, I think, what people have generally understood to be the rule.

Now, if there is an area for concern from a labour relations point of view, it is the question of what exactly is producible to the individuals who are affected by correspondence? Earlier in the hall today, I had spoken to Steve McCann and I said, after looking at the index of personal information banks that is available on display, I wanted to take it with me but it was only on display... perhaps my access to information will include that in due course. I was surprised at the breadth of personal information that was digested in the index. I said to him, just before coming in, "I thought the Ontario Government had really one-upped itself in that they seem to be putting more into the index than I had, in my original opinion, thought necessary."

When I went back and reviewed the definition of "personal information bank" I found on reflection that, in fact, if you intend to access any information by using someone's name or other identifying code, you have a document which belongs in your personal information bank and I think if there is any comfort to be taken from those who are looking at monitoring the requests, the information bank is so huge that somebody who wants the information is really going to have to sit down and have a good long study just to determine what is there. I particularly liked the personal information bank that dealt with vehicle mileage claims and the miles per gallon of individual employees using their own vehicles for the purposes of the government and I think that should prove a fruitful source of inquiry for the future!

There are three major labour relations issues and if I may be excused from addressing this more from an employer point of view than an employee point of view, it reveals a bias in the profession and that is that labour lawyers, unlike I think lawyers in other fields, are quite divided. You really do not cross-over and represent both sides and in this instance, I am an employer-side lawyer and if I come off with my remarks being more directed towards the management end, my apologies. I will be happy to entertain any questions directed from the employee or the union perspective.

There are three primary issues that come out of this freedom of information and happily, the section references the amount of statutory study that you must do to understand where you are going is, thankfully, a little limited in this instance. The three issues are, first, what can the employee reasonably have access to under this Act? If you are a supervisor, I think the possibilities that you can see for potential areas of inquiry are large and I think we have all heard recently the press talking about "libel chill" and that is, they are afraid to write anything in the event they get sued for it and the burdens, as they claim, are all on them in the law and they find that unfair. The American experience is there -- as Canadian media are concerned is a much better one for the allocation of burdens of proof. Now, that is just an analogy. What I would like to say, before getting into the strict, boring bits, the section by section dissection, is that you, as individuals, if you are managers charged with, among other things, monitoring your employee performance ought not, because of this Act, change the way in which you go about your business. As a general statement, reduced to its simplest form, the message is, if you want to seek opinions or advice from those people in your organization who you go to for labour relations and personnel advice, nothing in this legislation, in my view, should operate to inhibit you in any way from doing so.

The question that comes up and the reason for making this point is that you may fairly ask, what if what I write comes to the attention of the person I have written it about and quite apart from the penalties in the Act and the penalties for violating the Act, the affect it might have on your employment tenure, I would like to leave all of those legal issues aside for the moment. The thing that I find hits home time after time with supervisors is in most cases, there is no real personal animosity and they would just as soon -- an individual employee who has had something written about them -- not know that it is there. It is not necessarily that you want to be secretive and have a "star chamber" going on without the knowledge of the employee but sometimes your views are speculative, sometimes your views are subject to change. Sometimes your views are simply things that in your discretion, you would prefer not to have individuals know about in the event it affects their self-esteem. There may be others who sit on the other side of the fence who have a less charitable view of the motivations of managers in those circumstances but from my experience, I can put it in those terms.

Secondly, from an individual employee's point of view, and you all I take it, most of the people in the room today are either now subject to the Act or soon will be. I was told that there is a municipal contingent here today that is probably sitting simmering or fuming over being included in the Act at the last minute and that is the only reference I will make to tugging my forelock to those who originally sent me here. From an employee point of view, you do want to know what is being said and written about you, especially people who are going to make decisions about your well-being and your employment or elsewhere because the Act is more than just a tool that gets used in-house. I think, if you have been here for two days, you have heard more about that than is necessary for me to repeat here. But that is the second concern.

The third concern from a labour relations point of view on a broader scale is, is there a right of access on the part of individuals representing unions in the government institutions or indeed people on the outside, the media, public interests groups? Is there a right of access to that kind of information which is going to affect the conduct of your department, your branch, your ministry or the government as a whole in making personnel policy and in dealing with the accredited agents of the employees? I think, in a short and sweet remark, the simple answer is, as I said before, nothing has changed.

If you go to the exemption provisions of the Act, 12 through 21, you are going to see exclusions there for information that will prejudice or adversely affect the state of negotiations between the government and agencies with which it is negotiating. Secondly, you will see a specific exclusion on disclosure of information relating to labour relations and that is one I would like to emphasize because I think that goes beyond simply the macrocosm, if I may, of the Ontario Public Service Employees Union. Other unions within the Provincial Government do not come quickly to mind, although the College of Regents will undoubtedly come to grips with this in the community college scene and I am sure we will hear some more on that in a moment. There is that macro level from an individual point of view.

It is my opinion that you are equally requesting and dealing with labour relations issues, if you as the supervisor write to the director of personnel in your branch or your ministry and say, "I have employee "X". These are my observations about performance of employee "X". This leads me to conclude, although I am not an expert in the field, that we may have the basis here for certain disciplinary action or other action against the employee. I would like your advice and your comments. I may not be as familiar with the collective agreement (or, where you are not dealing with unionized employees, the personnel policy) as I ought to be and perhaps we ought to investigate these matters because I am not entirely clear about whether, in fact, I am right."

Now, that is not the kind of thing I suspect if you were a manager that you would want out in front of the person who is affected by it and perhaps, I say as a cautionary note, individuals do have to make application for access to this information. It is not a question simply of sifting through the files. Without getting into too strict of an analysis, the message in that instance is, in my view, as a labour relations matter, it can be communications that you have prepared, while they are part of the personal information bank, are not subject to production to the individual who is the subject of the communication and the reason for that is the exclusion -- I will have to refer to the section for a moment if you can bear with me. I believe it is s.14. No, s.14 is law enforcement. It is s.17 I am being told. I have not come up with that myself. Yes, it is s.17. That is something that I think you can fairly rely on. In addition, there is also a prohibition against disclosure. Perhaps I should better call that an exclusion from disclosure for matters of personnel policy that have not yet been announced that are in the planning stages and you are again, whether it is personnel policy in my view, in your branch level or your section level, or whether it is personnel policy at the ministry level, in my view, you can reasonably issue those document, knowing, if you name names, that they are validly a part of the personal information without fear of disclosure.

Now, other people in this seminar, this two day seminar, will speak about the access and appeal procedures and I do not propose to address those today but as a general reference, you can go forward confident in that knowledge. The reason and perhaps the other section that you should be aware of goes into section, I believe it is s.64 and again, I may be mistaken on that because I did not want to belabour the section references. No, I am mistaken on that. I will have to check my notes in a moment. The message I want to pass on is, individuals who make requests for access to information, whether it is personal information bank information or information of the government generally are still subject to all the same exclusions that third parties outside of the government are subject to and in that sense again I think before anyone wants to say the sky is falling and I am not sure anyone is saying that, but if that is a concern of yours, I think you can rest assured that the reasonable basis for confidentiality that existed before this Act comes into play, from your manager's perspective, remains.

The second question I want to deal with and for me, the most significant, is the question of managers having access to the personal information about employees and that, in my experience which is granted a municipal background and not a provincial background, but that experience that I have had has been quite casual. In the personnel departments that I have encountered, there are a bank of files. There is some nominal scrutiny paid to who is getting in and out of the files. It is not something that if you were cunning you could not defeat but there is obviously some observation. People do not just flip through the files in the cabinets willy nilly but access is informal. If the person who has nominal charge of the file is satisfied that you are someone with the right to know, you get to go through the file and from a labour relations point of view, whether you are looking at the unionized sector or the non-unionized sector the thing that you have all heard, I am sure, time and time and time again from lawyers and labour relations professionals is document, document, document. I have repeated that myself. I wonder sometimes how much that helps but that is the background against which this Act now sits.

If you are supervisors, you have been encouraged to document, document, document. If you are an employee who feels that for reasons that are quite unfair, people are trying to impair your employment security, you are also likely to be someone who is going to document, document, document. However, your material is not caught by the Freedom of Information Act. It is not being gathered on behalf of the institution. From the management side of the coin, and again if you are subject to management action, this is equally significant to you, you want to know who is going to get into the files and have a look. If you are the person charged in your department or in your ministry with implementing this program, I have what it seems to me are a couple of suggestions. Now, the great thing about lawyers is, they can tell you what you ought to do but it is the rare lawyer who can actually tell you how you can go about doing that and unfortunately, I do not fit into the category of the rare lawyer. However, I hope my colleague who will be following me is going to be able to talk a little bit about how you actually go about doing what the Act obliges you to do.

I would like to say that what I think you have to do, if you are looking at who is going to have access to employee information, you first have to, when you are gathering your personal information bank and this has been done by the Ontario Government so far, you have to particularize your uses and if you do not particularize your uses, people who want to get into the personal information bank and do not fall within the description of the use, have to make the formal application under the Act, just as though they were a third party. I think one can see certainly that you do not want to make an application in writing, wait 30 days for a reply, have the person about whom you seek information get notice of the request and endure the appeal procedure, simply to track down perhaps whether this person has sufficient vacation.

Now, I exaggerate the example just to make the point. From an organizational point of view, the task that is before you now and I suspect the task if you are a provincial employee has already been completed, is firstly to properly identify those people who are going to meet the requirements of the Act as being people who are entitled in the course of their duties, to have access to personal information. I can make the section references for you there. It is s.44 and s.45 of the Act which are important here.

Secondly, because we are a society governed by law and because a large number of the people here are employed by the government that in fact has made the law, we all have a personal and moral obligation to implement this Act, keeping in mind its spirit and my goal of remedial legislation -- no one wins the day going before the Access Commissioner or subsequently in the courts fighting about access to try and argue some narrow technical ground that says, "Well, the Act really wanted to do this but if you look at the language, My Lords, it doesn't quite make it."

I will say to you that as individuals who are not employed strictly in a labour relations capacity, if you were to have access to personal information about employees you supervise, I would suggest that that be clear in the description of the personal information bank it uses and secondly, it be clear in your job description. I will just, if I may, I had one other remark which is not coming immediately to mind and then I will vacate the stage, if I can just check my notes for a moment.

The one last comment I had to make is something that I think has probably been canvassed already. As individuals, you are and I think if you are not, should be aware, of your rights to have access to files and make corrections on the record or provide a statement of disagreement. This will undoubtedly have some impact where there are formal performance evaluations that you want to record your disagreement with. Those rights may exist already under the collective agreement. The procedures are there but I think if I was to come away at the end of the day, although we have to be a lot more formal about the way we go about the task of managing the personal information of employees, I would say as a concluding remark that while the procedure is more complex, the substance of it, I think, is largely unchanged and I think the drafters of the legislation did a good job in seeing exactly what had to be done.

Until a few of these appeal procedures have gone through, no one will know if everyone's legal opinions are correct but in my view the rights and the obligations and the common sense of the situation that prevailed before this Act has come in remains after the fact. However, now you have to be prepared to justify yourself. So, sorry for running over and thank you for your attention.

Jackie Robarts, President
Niagara College of Applied Arts and Technology
Welland, Ontario

In the general information section of the conference program, it states that a variety of speakers and panelists, all experts in their area, will deal with emerging issues. I want to be right up front with you and say that I do not qualify as an expert on the implementation of this Act as it will affect the community colleges in January of 1989 nor am I a lawyer and how I wish I was. There are many representatives here today from our 22 community colleges, many of whom have been familiarizing themselves for this past year, on the various aspects of the Act in preparation for assisting persons like myself who, as heads of our institutions, will be expected to make many and varying decisions as directed by the Act very soon.

Those of you today that are here representing municipalities and local school boards may be thinking, "Oh well, we've got a couple of years to get ready for the implementation." I can assure you that you will really need that time in order to familiarize yourself and understand the Act because it does take time. I had the opportunity last week of attending a day's orientation session on the Act in my own college with managers and at the end of the day, I came to several conclusions. Number one, as the head of the institution, I wished that I had a legal background or at the very least, a lawyer in the employ of the college with whom I could be in contact whenever I was in the position of having to make decisions impacting on my college as a result of the Act and I suspect that other of my fellow presidents in the system feel the same way.

In most of our colleges, the role of the Freedom of Information Coordinator has been assigned to an employee as an add-on responsibility rather than a full-time job and it is my sense that we may well have to have full-time coordinators to keep up with the demands placed upon us by our internal and external community members and I suspect that many of our persons here today in those roles for our colleges would agree with me. Thirdly, I am glad that the Ontario Government, in its wisdom, has set up a Freedom of Information and Privacy Branch under the direction of the Management Board Secretariat to assist the government agencies in the implementation of this important act.

In making a contribution to this panel, I felt that it would be most helpful to share with you a few of the policies and procedures regarding human resource management and privacy that have been impacted by this act. What kind of policy changes and procedures have we had to consider and many of you have already had to do since you are under the Act now, and for those of us who will be there in '89 or in 1991? In my own institution, we are grappling with these changes and my sense is that we will be articulating new policies long after January of '89. So, my remarks today may be useful in alerting you to some of the things that must be done rather than giving you the answers of how to do it.

First of all, the policy and procedure changes. In our colleges, two groups for whom we must be able to serve in relation to the protection of individual privacy are our employees and also our clients and students and I suspect that at times these two groups will be in conflict over the need on the part of one to access information about themselves and on the other hand, the requirement to protect individual privacy. An example -- in the past it has been the practice of many of our teachers to post the examination results of their students on a classroom bulletin board so that all students receive their own information as well as a snapshot picture of where they stand in relation to their classmates. Under this Act, there must be no way that the individual privacy can be violated and therefore, such practices are no longer possible unless the students are given some other kind of identifying code known only to themselves. It is possible that students also may wish to access certain information about their teachers which should not be given to them because of the teacher's right to certain individual privacy. So, many of these things in the past have been dealt with in a wide variety of ways and often very informally.

Is a teacher's resume his own private information even though he may have circulated dozens of copies to various hiring institutions when seeking employment? Do teachers have the right to circulate students' resumes to potential employers when attempting to obtain cooperative educational placements for the student? Does the student have an obligation to provide parents with information about a student's progress and performance in college or as adults, is the individual student's privacy protected by the institution? While we would all agree that we must consider the student's right to privacy, it is not always uppermost in the teacher's mind that he or she must not provide such information without the consent of the student.

I suspect that there will be more than one case that will end up on the Commissioner's desk because the institution has not provided the information that the public believes they should have access to. Some of the things that you must consider, therefore, in your human rights resource management are your hiring policies and procedures and the applications for your employees and for students applying for admission to college programs. A notification and consent statement needs, on such applications, to alert the student or the employee concerning the information that is being collected. Just as an example, in our own college this is the kind of statement that will be appearing on registrarial forms that a student might be filling out to protect him:

"The information on this form is collected under the legal authority of the Ministry of Colleges and Universities."

and it states the Act.

"The information is used for the administration and statistical purposes of the college and/or for ministries and agencies of the Government of Ontario and the Government of Canada. For further information please contact the Registrar."

and gives his address and then,

"I have read the above statement and hereby authorize the release of information contained herein to the aforementioned."

and it is signed and dated by the student. Because we have students as of the first of January who filled out applications one, two or three years ago, we are also having a statement signed by them which says,

"I have read the above statement and hereby

authorize the release of all records related to my registration and academic progress to the aforementioned."

Also, there needs to be a similar kind of a statement on the application form of the employee so that information that we do have to send to the Ministry regarding wages and things like that, can be done so.

As far as the admission policies and job competition information, criteria for admission to each college program has now been documented in such a way that the college can respond to each applicant who has been refused admission to the college, giving the reasons why admission has been denied to him, and only to his parents if the student permits it to be given.

Job competition files are another interesting thing which we hardly consider because over the 21 years of our college system in Ontario, we have not collectively held similar job competition methodology. Some human resource departments have done an excellent job of documenting all parts of the competition while others have made decisions on the successful applicant with minimal documentation. For some of us, this new Act has made it mandatory that job competition files be completed, including such information as the applicant's forms, the resumes, where applicable job advertisements, screening and evaluation information and the appointment of successful applicants.

For information pertaining to each applicant, the job becomes part of the personal information file for that individual. However, severance of the other competitors' information will be necessary unless permission for the release of these individuals' information is granted. The person not getting the job may request the job competition file and the head will then have to determine what information can be made available to the requestor. Our learned friend here has already talked about references and the importance of obtaining permission from the employer or the student to give this information out. In the past, many of us in our attempts to be open and above board and wanting to share as much information as possible may now find that we have to be very careful about what information we provide and always with the consent of the individual. Just as an example, I recently had a telephone request for a reference for one of my college managers who had applied for a position with another college. However, he had not indicated to me that he had been seeking employment with that college and I received the call and found out the applicant had not listed my name as a reference and therefore, I must not give that information out until I had obtained the individual's permission to do so which, as you can appreciate, in some situations might be somewhat embarrassing to the individual. But we have done this very easily in the past and not thought about it and these are things now that we have to bring ourselves to attend to.

Another thing that is important, I believe, is a records management system. Unlike some government agencies, our colleges have not been subject to the central records management system. While it is true that certain records are retained for so many years as dictated by things like the Income Tax Act or the Unemployment Insurance Act, the Workers' Compensation Act, etc., most of us have not reviewed all of the personal information records that we keep to make a determination as to how long these records will be kept. For example, some of us keep job competition files for three to six months, others for a year, others for as long as there is filing cabinet space to accommodate them.

I would recommend that all institutions must have a records management system with policies that state how long the various records will be kept. As an example, if the job competition records are kept on file for one year and then destroyed as stated in the policy, if an individual requests competition file information two years later, it is easy for the head to deny the request on the basis that it is no longer on file. However, if the information is destroyed right after the job is filled, it will be very difficult to handle the request without these policies. This would also apply to student records kept during his or her program and perhaps destroyed upon graduation except for his transcripts which may be kept for as long as the institution is there.

Another thing that we have looked at in our colleges is the way in which we keep our personal and student records. We attempted to centralize this information in specific areas within the college, such as the Personnel Department and the Registrar's Office for student records. There is a tendency for managers to collect information on employees reporting to them on files in their own offices, rather than in the Personnel Department, and then when requests for information are made by the employee because his latest evaluation performance is not in his personnel file, the individual managers had often put it in his own file with other notes, believing that it is his information and not realizing it belongs to the employee. Mr. Rafferty's comments today will be some solace to people who are very concerned about what they write down now. Therefore, we are encouraging that we try to keep this information in one place.

With many of our employees, about a third of our complement today having 15 to 20 years service in our institutions, many of our personnel files are long overdue for review of relevant information only within the file. So, we have been asking our Personnel Department to go through these and to keep only the relevant information. Student records -- many of our teachers have kept individual records for students under their tutelage, again they have not recognized the fact that it is information to which the student has a right of access. Many of our managers have expressed the very concern that Mr. Rafferty mentioned in terms of what they write down. Are they going to be held before Human Rights and so forth if they do that? We should all remember that personal privacy is one of the most valued protections that we have and we should handle such information in the same ways we would want our own personal information handled.

I now have been tapped by my friend here and therefore, I would only like to make two more statements and then I will shut up. In relation to -- I will say though, I have not quite had my 15 minutes! I looked at the time that I got up! Work in this whole area within our college as administrative tasks that have to be performed, whether it is changing forms, consent forms, determining the security and how it is going to be held, who has access to what and who can do what to whom and not withholding information that is personal information but not giving out information without consent.

Privacy in our workplace is going to be one of the major concerns in the 1990s as was said this morning by our Keynote Speaker. It is now up to us to provide access to information but also to protect individual privacy. A key to the 90s will be how well we do this. In our wish to conform to the Freedom of Information Act providing access to information, we must also be very mindful of the protecting of an individual's privacy. Thank you very much.

Carol-Ann Skey

Thank you panelists. Are there any questions that anyone would like to ask? Come to the mike, please. Lisa?

Lisa Philp, Coordinator Freedom of Information and Privacy Ontario Hydro,

Yes, this is more, well, sort of a statement and a question, I guess, combined, directed to Mr. Rafferty. I was kind of amazed to hear the comments about performance information about employees. So, I think, first of all, the third party exemption or the s.17 exemption which refers to protection for certain labour relations information is for information supplied in confidence by third parties where it is a certain type of information including labour relations information. It is not personnel information created and compiled by institutions that are covered by the Act. Secondly, I don't think anyone would say that performance appraisal information on employees within an institution is labour relations information and thirdly, in the definition of personal information in the Act, opinions of an individual about another individual are explicitly stated as being that person's personal information and since individuals have a right of access to their own personal information, how can you possibly state that performance information in personnel files can be withheld from an employee on request?

Liam Rafferty

The question is well stated because after I had made the reference to s.17, I realized I should not have made the reference to s.17 and you are quite right. S.17 refers to third party as indicated in the explanatory notes on the side of the statute. You are quite right. S.17 is not the one that I should have referred to. What I should have referred to although when I read, I should say just by the by, that when you read the explanatory note on the side of s.17, where it is described as third party information and when you read s.17 without regard to that explanatory note, as a legal opinion, it is my view that the two meanings differ. Now, I agree that when you rely on the word "institution" to describe the activities of the individual employer, you can make that argument. I would, however, without saying that your comment is incorrect because I think looking at the explanatory note you have hit it, without saying that your comment is incorrect, it is my view that the breadth of s.17 is broader than that which the framers believe it is restricted to when they say third party because they refer to any person and any person can include people within the institution.

Having said all of that, your comment based on the face of the legislation is correct. Going on to answer it then, looking at the provision and I will have to, if you will bear with me, look to the provision that talks about personnel planning. I am taking it out just quickly. Is it s.18? Yes. Yes. It is (e) and (f) management of personnel and positions, plans, procedures to be applied in the negotiations. Those two are, in my view, broad enough to accomplish the goal. There is something that I should have said in my remarks which I ought to have said and did not and that is as far as solicitor/client privilege applies, where that information comes from the legal branch, the privilege kicks in as well. Now, going past that to the description of personal information, which includes opinions as such and could you refer me to the section again? It is s.37 I believe, isn't it? No, it is in the definition at the beginning of the Act or in s.37. At the beginning of the Act? Yes, yes.

Lisa Philp

Well, it does appear that one of the central purposes of this Act is to give individuals the right of access ---

Liam Rafferty

I agree.

Lisa Philp

-- to information about themselves. So, if you give s.18(1)(f) "operation of the institution" and "management personnel" such a broad interpretation that it would cover any information about a person compiled in the personnel area, then I think you are definitely going against the spirit, the intent of the legislation.

Liam Rafferty

With respect, I disagree. I think that the comment is fairly made that the employee is entitled to know what it is that constitutes the official record of the employer. The employee, in my view, by virtue of the Act is not entitled to access to information which is of a speculative nature and which has not formed part of the official record of the employee. I would say the balancing interest from the individual employee's point of view or from, I'm sorry, from the institution's point of view is that, in my view, one cannot reasonably manage the institution if one is of the view that everything that you say, that all the advice that you seek whether it is legal advice or labour relations advice is subject to disclosure prior to perhaps your suspicions being verified. There is also one other provision in the Act and again I would have to take a moment to refer to the section number but it also speaks about exclusion from disclosure relating to actual or possible judicial or quasi-judicial proceedings and quasi-judicial is the great administrative law term to describe, among other things, labour arbitrations. Formal judicial proceedings, of course, are proceedings in the courts.

If the manager is concerned that there may be basis for disciplinary action and quasi-judicial proceedings which follow, it is my view that the kind of advice that he seeks and the kind of documents that are generated to either verify the suspicion, seek advice or, in fact, find out that they are way out in left field are all, again, protected under that purpose and I think, -- your fair comment is that employees should know what forms the basis of their record but it is my view that on the competing interests, the one that I think is protected by the Act, is that the manager has to be able to manage and satisfy himself or herself about suspicions, whether they are held rightly or wrongly and that that kind of chill is not something that the Act contemplates by exposing individual concerns about performance that may or may not be verified to the scrutiny of the subject employee.

Jackie Robarts

It seems as if that question is a very controversial one and some of your comments are ... perhaps we can have ----

Liam Rafferty

I know Evan wanted to say something on the point as well.

Evan Hendricks

Yes.

Liam Rafferty

It may be, Madam, maybe if we disagree and I appreciate that and you were quite right to point out that s.17 is not the correct charging section according to the annotations but my view of the correctness of the statement is still the same and that is for matters of personnel planning and for matters of actual or potential quasi-judicial litigation, the privilege does exist and it certainly exists when you seek legal advice on the same subject.

Carol-Ann Skey

Perhaps Mr. Hendricks will make a comment and then we will have our last question?

Evan Hendricks

Yes, this will be real quick. The difference is shown sometimes where one lawyer will starve, two will prosper! The thing is -- this is really an important issue because in the United States, the Federal Privacy Act, the main use for this has been by federal employees seeking their own information in personnel circumstances and it does not take a crystal ball to see that is probably going to be one of the main uses here in Ontario, too.

Carol-Ann Skey

Ann?

***Ann Cavoukian, Director of Compliance
Office of Ontario's Information and Privacy Commissioner
Toronto, Ontario***

I know we are short of time and I don't want to belabour this point but I do want to reinforce the comments that Lisa made and express my feeling from the Commissioner's office that we also disagree with some of the comments that you have made. To indicate that the status quo, in effect, continues and that the Act has had very little change to personnel practices in terms of access to personal information I think is a generalization that does not apply from the Commissioner's office, in terms of appeals that we have seen, related to this case, it is clear that individuals, employees are getting access to a lot more information than they would have before and that the process is being taken very seriously by managers. That does not mean that everything is released. There are a number of factors considered in job competitions but believe me, things have changed and I think to suggest otherwise does not reflect the reality of the situation. Thank you.

Liam Rafferty

If I may say, there is no dispute that the access to information and protection of privacy has formalized and limited the ease with which individuals may have access and I would say, again with respect to those people who are involved in the implementation and direction of the Act, that there is no doubt that people are now accountable for what they know and how they came across knowing it. What I would be surprised to hear and I think especially from those people charged with implementing the Act in individual work places in the government, is that the balance has shifted such that managers do not have an existing discretion or a remaining discretion and a right of privacy themselves to generate information and make inquiries which because of their speculative nature are not things that really ought properly to be before the employee because again they do not form part of the permanent record. If the effect of the Act is to have or to create a chill, in my respectful submission, it is not. If that is the effect, what I think you are coming towards is a situation where the monitoring of individual employee performance and that is clearly the hot issue, becomes something that people have to do in their heads, and you almost have the secretive view of, "Well, we can't make any written record of this" and argue that the Act even prevents that because the Act says things do not necessarily have to be in writing to be a record but again, it seems to me that the purpose of the Act has been not to throw the balance off; it has been to ensure that those people from the employer's side and the institutional side who are going to have access to the employee information not have access willy-nilly. The correct people who are entitled to go into the files are the only ones going into the files and anyone else who is going into the files leaves a record that says they were there. So, again, with respect, the Commissioner's office certainly has a view of the breadth of this position. In my view, the legislation is not so broad as to disentitle the supervisory people in the organization to the kinds of advice and assistance that they were typically entitled to in the past.

Carol-Ann Skey

Thank you. We just have time for one question and it is directed to Mr. Rafferty.

Connie Mahaffy, Coordinator
Freedom of Information and Privacy
Ontario Ministry of Correctional Services

Just a quick comment, s.47 of the Act clearly gives individuals the right to personal information about themselves notwithstanding whether it is positive information or negative information and I work in one of the most labour intensive, if not the most labour intensive ministry in the Ontario Government, where there is a very active labour relations environment and I can tell you that a lot of our managers are very surprised when we release personal information to their subordinates. It may be very critical information bordering on people calling each other losers or whatever in correspondence. That information is going out to people. That, however, is very different from in terms of the s.18, the management of personnel plans. Like, if the Ministry is planning to reorganize itself or if there is something that the Ministry and OPSEU are negotiating and something that is subject to that negotiation could interfere with the labour relations environment of the Ministry, again, you have your exemptions, your advice to government, your solicitor/client privilege in terms of lawyers representing each side, but I think those are very different issues what is essentially one of the three basic rights in the Act. The right to access your personal information and then to follow up to request correction of it.

Carol-Ann Skey

Thank you. I know there are some people who probably have other questions to ask Mr. Rafferty. During the break, please feel free to do so. I would like to stop us right now and say thank you very much and on behalf of the Branch, I would like to present some presents to the guests. Thank you.

THE LEGAL COMMUNITY AND THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

James Chalke, Legal Advisor
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When the Young Offenders Act came into force in 1984 there was a joke going around that for lawyers the acronym YOA stood for "Your Own Annuity" because the feeling was the YOA created lots of work for lawyers and you could retire quite easily. I am not sure that is accurate but that was the humour going around. As you can see, it is not very funny, but we are lawyers and we don't get that funny. So, what is the acronym for the Freedom of Information and Protection of Privacy Act? First of all, you have to figure out what the right acronym is and a lot of people have talked about FOIPOP but if FOIPOP is right, that makes the Commissioner and his staff FOIPOP cops and that seems a little too much to handle. So, FOIPOP doesn't go over real big and then some other people call it FIPPA but to me that sounds either like a dolphin or some sort of British swear word.

I am not too sure what it really means but if you thought the acronym was FOIPA, what does that mean for lawyers in terms of the acronym and I think my view, after ten months of watching the private bar work, or not work with this Act, my expansion of FOIPA would be that it stands for the "Fortuitous Opportunity Ignored or Poorly Applied". "Fortuitous opportunity" because such statutes almost invariably are passed with the arrival of a new government and in this province that happens only every 42 years and "Ignored" because the interest of the private legal community has been quite minimal and "Poorly Applied" because in those instances where the Act has been used, it has not been used as effectively or as aggressively as it could be. This lack of private bar interest and expertise is ironic considering the very active interest and as time goes on, quite high level of expertise, among government lawyers.

One interesting feature of the Act that may go somewhat into explaining this lack of activity among the private bar is, in my view, related to the nature of the Act in that it is complex in structure yet written in a plain English style and the complexity in structure favours people who work with the Act frequently who probably are not lawyers, people like private/political researchers, lobbyists and journalists. Furthermore the plain English style, which is proper and appropriate for a civil rights statute like this, is strangely intimidating for lawyers because there are no Latin maxims in there that they can look back at their old first year law notes and try to remember what they mean. There aren't any "terms of art" and given the specificity of the exemptions, there really is not much room to manoeuver to suggest to their clients who are not lawyers some weird and wonderful interpretations of plain English words and I think that perhaps this is one explanation because lawyers find this plain English style strangely intimidating.

There are lots of other reasons as well. In any event, to describe their view, lawyers in acting for clients seeking information under the Act and seeking the prevention of disclosure of information and acting for institutions under the Act, we have assembled a panel of incisive legal minds and then there is me. My name is J. Chalke. I am a lawyer with the Attorney General. I currently work out of the Information and Privacy Branch with Management Board. Your right, is John Turchin who was called to the Bar in 1981 and currently works with the Attorney General with the Legal Services Branch at the Ontario Ministry of Treasury and Economics and John, at one time, was a customs officer at the Toronto airport, he tells me, which allowed him to see all sorts of secret things, many of them which would be prohibited both under the Customs Act and the Criminal Code. In the middle is Kathryn Munn. Kathryn was called to the Bar in 1978. She has served as Associate Director and Executive Director of a couple of Legal Aid clinics in London, Ontario. She has been active in various provincial committees concerning Legal Aid Clinics and various aspects of Poverty Law and on the far right, your far left, is Russell Juriansz, who was called to the Bar in 1974. Russell is an associate with the law firm Blake, Cassels and Graydon and previously, he was the General Counsel with the Canadian Human Rights Commission.

The format of the panel is that Kathryn will take about ten minutes to discuss acting for individual clients who are seeking information from the government and from tribunals. The other panel members will then have a short period of time to respond. Sort of like those political debates we have been seeing. Then, Russell will comment on acting for a corporate client both seeking information as well as seeking the prevention of disclosure of information and then finally, John will discuss acting for a governmental client.

The emphasis here is not going to be so much on what the Act says but rather on the role of a lawyer in these various capacities. Kathryn, do you want to take it away?

Kathryn Munn, Solicitor
London Legal Clinic
London, Ontario

I am going talk about the Freedom of Information legislation in the Administrative Law area. I understand that I do not have to say "Key To The '90s" in my presentation, so that is out of the way. I am going to be focusing mainly on the provincial legislation and when I talk about administrative law in the poverty law area, the types of statutes that I would be dealing with on a usual basis would be things like the Family Benefits Act, General Welfare Assistance Act, Criminal Injuries Compensation, Workers' Compensation at the Provincial level. So, though I will use those as my examples, I think that you certainly could generalize what I am saying to other tribunals and other legislation, particularly in the income maintenance area which is what those statutes deal with, the things like the Family Benefits Act and the General Welfare Assistance Act. The government is the other party. So, there is some potential for use of the Freedom of Information statute in order to obtain information, both personal and general, that can be of use to an individual client.

So, I am going to talk about three main sections in my presentation. The first one is obtaining information from Government, personal information and general information. Then, I am going to talk about obtaining information from tribunals and finally, I am going to make some brief comments about the protection of privacy aspect of the legislation in respect to individual clients. The idea of the access to information in the legislation is to expand the pre-existing access. To give you an example, in the legislation that deals with the Family Benefits Act, there were two problem areas for obtaining information to assist individual clients. As you may know, the Family Benefits Act permits an allowance to be paid to someone who is disabled or permanently unemployable and usually a determination for one of those two categories requires a medical report and the practice of the Ministry was, up until this year, to allow some disclosure of the information in the Ministry file when someone was appealing the decision to deny them benefits but never to disclose the doctor's report and often, there was very limited disclosure of the other information that was in the Ministry's file. This made it very difficult to proceed with the appeal to the Social Assistance Review Board because often the client did not have their own copy of the doctor's report. Sometimes they could not even remember what doctor they had been to. So, you could not write to the doctor and obtain the report. There often, in some situations, were many doctors involved and again, it was very difficult to obtain the information from anywhere other than the Ministry file as to what particular reports had been relied on in making the decision.

Coincidentally, with the coming into force of this legislation in 1988, the Ministry of Community and Social Services changed their practices and I think this is probably one of the ways that the Act works best is so that there is no need for an actual formal request under the legislation and the whole appeal process that kicks in after that. What the Ministry has done, at least in our area, and I understand at least generally in the southwestern area of the province, is to allow access to Ministry files, including the medical reports, including the summary by the doctor who has reviewed the medical report in order to make the determination about whether or not the person qualifies for benefits.

So, my experience in that area is that it has not been necessary to formally use the Freedom of Information Act to obtain the information but interestingly, that was changed this year to allow a much greater access. For municipalities who administer the General Welfare Assistance Act, there is now a little bit of a discrepancy. It is sometimes hard for people to appreciate that they can get access to the information in their Family Benefits file, which is housed at the Ministry of Community and Social Services but not to their General Welfare Assistance file which is housed with the municipality. People do not appreciate that there should be any difference.

I think perhaps there might be an argument that could be made that information that is stored in the Municipal Assistance Information Network system which is, I understand, also accessible to the Ministry of Community and Social Services perhaps could be considered to be under the control of the Ministry for the purpose of the Freedom of Information legislation and perhaps access could be obtained to that information even though the formal municipal side of the application of the Act has not yet come into force. I suppose there is some potential for argument under s.15 of the Charter that some social welfare information in files is disclosed or is available to the person and other information is not.

Particularly in integrated offices, which is not the case in London, but in other parts of the southwest that I am aware of, clients find it very difficult to appreciate why, when they move from General Welfare to Family Benefits all of a sudden the rules with respect to access to their file information have changed. The only limitation on obtaining access to the file now, the full file, including the medical reports and the medical summary by the Ministry's doctor, is the s.49(d) exemption, if a disclosure could reasonably be expected to prejudice the mental or physical health of the individual. I have not personally had any cases where the Ministry claimed that exemption to apply. So, I cannot give you any personal experience about the circumstances where that has been evoked.

The only other problem that remains with the application of the statute is whether or not copies should be provided. In some areas, in my own area, copies of the information in the file are provided to the person or to the person's lawyer upon request. In other areas I understand there is some difficulty in actually providing a copy but other than that, it seems that things have changed very much for the better with respect to that particular area. Further, with respect to the charge aspect, the fees, I just want to sort of note that in the income maintenance area, any fee, really any fee at all would amount to potentially a denial of access since the people are talking about receipt of welfare or, in fact, usually denial of welfare or family benefits, so a fee is a major hurdle to someone at that income level.

My experience and my understanding of what the Ministry policy is, is that for personal information there will be no fee charged and I think that is certainly a good approach to take. The other sort of problem area in the income maintenance area under the Family Benefits Act was the 'spouse in the house' issue and probably you have been following the changes in the legislation, the regulations of the last year or so, as they have tried to bring that legislation into compliance with the Charter and other litigation matters that were pending at the time the change to the regulations was started.

For those of you who do not know, the Family Benefits Act also has another provision which allows funding of a sole support parent who is living as a single person and that is usually called "Mother's Allowance" by everybody except the legislation. It is not called that anywhere in the legislation but everybody knows that it is "Mother's Allowance" and what happens is that sometimes a neighbour or an ex-spouse who is upset with the person or for whatever reason, there is a report to the Ministry that this person is not living as a single person. Now, I think under the definition of personal information, the view or opinion of another person about the individual, either by the social worker or by the neighbour or the ex-spouse or whatever, would be personal information that could be obtained. What you get into is the question of whether or not it is an unjustified invasion of the privacy of the reporting -- the person who has made the report -- and the further difficulty for a woman who may have had some kind of report noted in the file is that she may not know that there is something there under the new regulations that she is allowed to live with someone for three years before she has to make a decision to either terminate the relationship or no longer receive benefits.

Basically, under that area, there has been a decision now made by the Commissioner. It is in the materials if you picked them up from the table out there. There was a decision in August of this year that was related to this area. Basically it was determined that they could not sever the information and there was an unjustified invasion of the other individual's privacy. The sub-question to that is can she get the information in her file corrected if it is wrong and I think you could probably try, under s.47(2), but it may not be correctable if it is considered to be someone's opinion and if it was accurately recorded, that may be all that can be done.

Another example of how the expansion of the previous access has happened with the coming into force of this new legislation is that under the Workers' Compensation Act, you used to be able to get access to a worker's file for the purpose of Workers' Compensation only where there was an issue in dispute, under the Workers' Compensation Act and then they would send the full file. The problem was if you did not have something actually pending, an issue in dispute at the time, you had to manufacture something in order to get access to the file. Now, with this new legislation, you can make a request and receive the information from the file without any difficulty and without having to commence appeals before you are actually ready to do that.

I want to just mention briefly s.13(2)(l) which allows access to discretionary decisions in the area, for example in Human Rights, the decisions and reasons of the Human Rights officer; in the area of Family Benefits, the decisions about supplementary assistance and special -- supplementary aid and special assistance, whichever way it goes. The extra assistance, for example rent, hydro deposit, special diet, medical supplies, that type of thing are all discretionary decisions which are not appealable to the Social Assistance Review Board. I think s.13(2)(l) may well give access to that information. It is a little hard to understand because it is an exemption to the exemption that applies to civil servants' advice. So, the net effect to the two-exemption to the exemption - is that in fact, the information shall be disclosed if it is the reasons for a decision, order or a ruling of an officer. I think that is certainly something that could be very helpful to an individual client.

Now, under the issue of obtaining general information from government, I think there is good potential for obtaining information that can be of use to clients either individually or as a group by making an application for policies, internal memos, planning information. I think there are a lot of areas for obtaining information that can be very useful. For example, in the policy area, there is policy of the

Ministry of Community and Social Services dealing with collection of overpayment and there may be some changes to that policy. I have made a request to find out what the policy is, what the plan is, what the practice will be for collection and litigation to collect overpayments from people who have gone off benefits. In Workers' Compensation, I think, obtaining memos that go to the Board doctors memos put out by the Board doctors, Board policies, can be very useful both to individual clients and to clients as a group in appreciating how the determination of their case has proceeded.

Obtaining information from tribunals. There are two aspects to that. One is obtaining the actual notes by the decision-maker. Now, this is again sort of a little hole that may or may have been intended in the legislation. S.65(3) exempts the notes of a person presiding in a court, i.e. a judge, but it does not use the phrase "court" or "tribunal" which it uses frequently elsewhere in the legislation, which seems to say that the notes of a person presiding at a tribunal would, in fact, be accessible. For example, at the Social Assistance Review Board, there is often no reporters. The current practice is to sit in panels of three. The presiding member makes the notes and those notes form the record that goes on to the Divisional Court if there is an appeal. Now, in many cases, the decision does not happen until, well, four to six months is sort of the norm for the production of a decision. There may be a dissent and the notes of the other two members of the panel may well be very helpful and may disclose facts or information that was not in the presiding member's notes which will be what is produced or forms part of the record for Divisional Court. Access to those notes may be important in a particular case especially where there is a factual dispute.

Also, Board internal policies could be obtained. Some boards have meetings where they discuss cases with respect to perhaps forming some similar pattern of decision-making across the work of the board and various panels. I understand that the Social Assistance Review Board no longer actually discusses cases at their weekly meetings but there may well be tribunals that continue to do that and minutes of those meetings could be very useful in the preparation of an appeal from the decision of a tribunal to a court and also, Board internal policies, Board memos and so on, could be useful.

James Chalke

Here comes the hook.

Kathryn Munn

Can I just mention very, very briefly the Privacy Protection experience...?

James Chalke

No, no, we will leave that... maybe Kathryn can squeeze that into a comment or answer to a question later. Anybody have any comments?

Russell Juriansz

Well, just a very brief one. I know that the Act says "court" but from a policy point of view, I think there is no question that the working notes of a decision-maker, a statutory decision-maker, should be exempt and I think the legislation should be amended to make that clear.

James Chalke

I would note that Russell used to be Counsel to a statutory decision-maker. Any comments, John?

John Turchin

No, I have no comments.

James Chalke

Okay, Russell, why don't you lead us into the world of Corporate Bay Street lawyers?

Russell Juriansz, Barrister and Solicitor
Blake, Cassels and Graydon
Toronto, Ontario

Well, I do have some comments about what you said, though, Jay. I agree that lawyers have missed the boat and the Law Society put on a Continuing Education Program after the Act was passed and it got very little interest. I don't agree that the Act is so simple. It's got exceptions to exceptions to exceptions and it's very plain language. It will have to be interpreted in actual cases and as a body of case law develops, it will be harder for an individual to use the legislation. Just this morning, in the Globe and Mail, there is a story of a decision of Sid Linden regarding the release of the name of the requestor to a third party who is making submissions as to why information should not be released. That is not clear in the legislation but that is a decision people should be aware of and there will be many of those.

So, my prediction is that when things settle down in a few years, lawyers will be very much involved and that, as is in the United States, the legislation will be used mainly by business. I think estimates in the United States are that some 70 to 80 percent of requests are made by business. I do agree with you, though, Jay, that private lawyers, private practitioners are not becoming acquainted with the legislation and so, when my prediction comes true, you Government lawyers will be a hot commodity. In fact, I became acquainted with the Federal Legislation while I was in government.

Now, governments hold a great deal of information on business. Regulatory agencies require that information be filed with them. There are investigators and inspectors that are always maintaining files on particular companies. Sensitive information, very sensitive information must be supplied on tenders for goods and services purchased by the government and the government is an extremely large player in that way. Financial and business information must be filed when seeking a grant or loan guarantee, though we may have seen the last days of that with Free Trade or much more restriction and of course, much information is provided voluntarily, just through cooperative relationships between business and government. Free Trade will affect things because Canadian business is going to have to compete with American business that has already become adept at using Freedom of Information legislation to gain competitive advantage. Not only by restricting disclosure of information about it, but also in gaining information about its competitors and about the regulatory contacts and government. Business will use this not only as a shield but as a sword as well.

Now, let's just talk for a minute about the third party notice and the use of the shield. S.17 uses the term "prejudice significantly" and also "undue loss or gain". These are simple words but require some fleshing out. They require the making of value judgments. What is significant prejudice? How much loss or gain is undue? Because it does call for the making of value judgments, when a private practitioner is making a third party submission, it is important to present it persuasively.

It is not enough to simply recite the sections and hope for the best and it is not always obvious why the client wants disclosure prevented because people come in and you say, 'So what? How is that going to hurt you?' You have to look at it through their eyes. You have to take some time to understand their operation and what it is that they are worried about and you have to convey, in that third party submission, the practical effect that disclosure will have. In my experience with the federal jurisdiction, mainly up to now, is if properly presented, the decision will be that there will not be disclosure. I think the most interesting and challenging part of the legislation is in trying to use it creatively to find out things that would be useful to business clients. Industries that are closely regulated can obtain insights about future regulations by accessing background studies. You may be able to guess what the regulatory context may be a year or two down the road if you know what policy work, what background work is going on now and if you are in a position to know that thoughts are being given to changing the current regulations, that is a good advantage and if you know in which direction the changes might go, that is handy.

There are many studies that may influence the future procurement plans of a government institution and if you know they are going to be buying something next year and you are able to gear your operation up for that, that will give you an advantage. You can get information about your competitors, you may be able to request tenders after a contract has been awarded. It will be replete with blacked out sections but seeing how a competitor organizes a tender and just the small information you might get would be extremely useful and then, of course, it is used in litigation. Not only in litigation against the government but in private litigation where the government holds information on everybody. We had one case where a product was found to be unsafe and was pulled from the market and the product had several different companies involved. Parts of it had been made and materials supplied and everybody was suing everybody else and to apply for and get the product testing reports from the government at a very early stage was an advantage.

In litigation against government, there is nothing in the legislation that expressly restricts access to information from the party against whom you are litigating to the discovery process. It may be, I suppose arguments could be made, that that has to be read into the Act but we will see, but at the present time, you can apply for information, perhaps more information than you get in discovery and prior to when you would be entitled to it in a court action. Where the litigation is before an administrative tribunal or against an administrative tribunal, you can apply for their practice directions to staff sometimes and policy manuals that previously were not disclosed and you can even apply for obsolete closed files involving yourself which would give you an idea of how they make decisions and on what basis they make adverse findings against you beyond what maybe was cited in extremely brief reasons that are communicated formally.

So, I think that the list of possible uses of information legislation is endless and it will play an increasingly more important role and I am glad to see some lawyers here at this conference taking an interest.

James Chalke

Thank you, Russell. Any comments from our panelists?

John Turchin

Yes, I have a comment. I am interested, Russell, that you expressed confidence in your abilities to succeed under a s.17 exemption claim if you make your case effectively enough. There is great concern among some members of the private sector bar and it was certainly mentioned by Penny (Bonner) yesterday, for most lawyers that there is an intrinsic problem in s.17 that the tests are too hard to meet and that in some circumstances, no matter how good your case is or how effectively presented, the information will be released to the detriment of the third party.

James Chalke

I just have one comment and that is that there is also another role for a lawyer advising a corporate client and that is earlier on than at the request stage and that is to make sure that your corporate clients know that there is a Freedom of Information Act, that information that they do submit to government will be subject to the Act in some form or the other and I think that that is something where in-house counsel in large corporations have become quite adept at learning the ropes and have organized almost Freedom of Information coordinators within corporations that organize the delivery of information to the government. I think that private counsel could also do this for corporations that don't have their own in-house counsel. Now, John is going to talk about acting for an institution that is covered by the Act, namely his Ministry which is the Ministry of Treasury and Economics and perhaps will give some guidance to those of you who will be acting for institutions that will be covered whether next year or in two years, in 1991, with respect to local government. Okay, John?

John Turchin, Solicitor
Ontario Ministry of Treasury and Economics
Toronto, Ontario

Thank you, Jay. I assume that some of you are counsel to government agencies and municipalities to whom the Act will be applicable in the near future either in January of this year or two years after. So, the purpose of my presentation is to provide you with some common sense advice of what you can do to prepare your clients and the third parties that deal with your clients about the Act and in addition, to highlight some of the features of the Act that I think will be of particular interest to you. I say common sense advice. That is what it is. My experience is that much of FOI is a matter of common sense. The legislation clearly will have to be interpreted and that will give us some indication of what it means but a common sense approach, I think, is a useful one to take.

In terms of advising your client, you will begin at the beginning, which is to have a look at the legislation, familiarize yourself with it and make some effort to assess the impact it will have on your client's operations. The next thing to do, obviously, is to brief the senior people within your organization about the Act and prepare a general memorandum outlining its features, indicating your assessment of the problem areas that you see. Point out, in particular, the legal nature of the Act. It is truly a "rights driven" piece of legislation. By that I mean that its scheme is to provide the public with a series of legal rights mirrored by a corresponding set of legal obligations on the institutions to which the Act applies.

For example, the Act imposes on institutions a responsibility to reply to a request within 30 days. If they do not, there is a deemed refusal with the corresponding right of appeal. It will be of interest to your clients to know that. The Act is intended to prevent sort of the bureaucratic dawdling that many people who have dealt with governments are familiar with and it does it in an effective way. In addition, I think you should try to encourage the development, in advance, of internal procedures under which requests will be handled. As well, you will have to assist in determining the types of personal information banks which are within your institution and advise staff of the new limits of the use and disclosure of personal information. You may wish to suggest that some routine memorandums be re-structured so that severing at a later time will be easy. This may be something like "fact part" and "issues part" and a "recommendation part" on the theory that under Freedom of Information legislation, facts and issues will generally be disclosable; recommendations will not. Some institutions may wish to review existing documents to attempt to preclassifying them into exempt and non-exempt classes and I know that one or two ministries within the Ontario Government have done that. In my view, this is an extremely time-consuming exercise and in many cases, I do not think that the benefits will outweigh the cost.

In any event, I think that you have to be extremely cautious about preclassifying documents. The validity or necessity of a particular exemption will often depend on the circumstances existing at the time the request is made and I think that there is a danger that by preclassifying you tend to inhibit a rational analysis of the request at the time that it is made and as a result, you may end up making a decision that is wrong, either from a policy point of view or from a legal point of view.

I think that the preparation that you undertake to inform your client about the legislation should be done, if possible, before the legislation is in effect. Because of the time limits in the legislation and the sensitive nature of some requests and the crisis nature that kind of surrounds them, I think your client will have an easier time if he considers the implication of the legislation in advance of its coming into force, without the pressure of a 30 days response. So, apart from advising your client, the next thing you have to do I think is advise the people that deal with your client on a reasonable and regular basis, third parties who provide information to your client. A lot of them, as we have seen, do not yet know about the Act, and I do not think, appreciate yet the significance and the importance that it may have to their businesses in particular.

In the past, a lot of the information that you had gotten from those clients would have been provided to you on a confidential basis, either explicitly or implicitly and those groups should be advised of the application of the Act and some of its principles and particularly, s.17. They should be encouraged in the future to make confidentiality claims explicit by associating in a letter going with the information that comes to your client or by using a confidentiality stamp and we have certainly seen plenty of that. The reason for that is simply an evidentiary one. Although s.17 exempts information that is sent in confidence implicitly, it may be hard to show that. It is much easier to show it if there is an explicit claim for confidentiality at the time that you received the information.

I think, as well, that you should advise third parties that the absolute confidentiality of information can no longer be 100 percent assured, apart from determining whether s.17 will exempt information in certain circumstances, which is a difficult judgment call. Even confidential information that falls squarely within s.17 can be released in certain circumstances and that is where the s.23 override applies which is that a compelling public interest in the disclosure of the record outweighs the purpose of the exemption. So, it is impossible to say to a third party, 'Sure, send it to us. We promise no one will ever see it.' You cannot make that representation any more.

With respect to future contracts that you're drafting, I think it is important that any confidentiality undertaking that you have be subject to the Act. In other words, "Subject to the provisions of the Freedom of Information Act, we will keep the information confidential." I do not think you have to go back and amend existing contracts because the Act as a matter of law will override those provisions from the public policy point of view, but I think in future you should do it and the reason is essentially to indicate that the expectation of confidentiality can no longer be held by the third party, to let them be aware of it.

You should indicate to third parties the kind of protection that s.17 does give them which basically is that prior to the release of confidential information, the third party will be given notice of the intended release and will have an opportunity to make representations to your Minister or to your client and ultimately, if it wishes, to the Commissioner himself. I think that by providing this type of advice, you may accomplish two things. First, you can avoid the kind of nasty surprises that you might otherwise encounter in the fall-out that you and your client will get from them. Secondly, I think that by informing third parties of their rights under the Act, you will make it more likely that they will exercise their rights and this is important because the third party exemption claim is based on evidence usually within the possession of the third party. A successful s.17 exemption claim means, for example, that it can be shown that release will prejudice significantly the position of the third party or interfere significantly in contractual negotiations or other negotiations or cause undue gain or loss.

A government ministry or agency or municipality is not going to be in the position, most often, to make that kind of assessment. The third party is going to have to make that itself with the assistance of its own counsel. If a third party is unwilling to produce evidence on an appeal, the Commissioner has indicated already, and quite clearly, that the exemption claim will fail. It is clear in the Act, the burden of proof is on the party claiming the exemption. So, in the case of a tie, the information will be disclosed.

There are a couple of things, though, or at least one thing that you can do with respect to third parties. There is quite an overwhelming concern in some circumstances that one third party may be able to use the Act to attain a competitive advantage and that the other third party will not be able to do anything about it. One thing that you can do or third parties can do is if they get a request under the Act for confidential information that they have supplied to the government and they think it is a competitor, to make an identical request for the competitor's information. Then, when the matter gets under appeal, if it will, they will at least be assured that whatever is released about them will be released about their competitor. So, they will be on a level playing field. That is about the only defensive tactic that I think will be particularly effective.

There are a couple of features of the Act that I will go through rather quickly. One is the solicitor/client privilege exemption. It is set out in s.19 and it is intended to be, in part, a codification of the common law, the usual solicitor/client prviliege exemption but aside from that, it goes a little bit further and it extends an exemption to legal advice given by Crown Counsel. What that means is that if you are a lawyer like me, who works within government, virtually everything you do and everything that you write will be exempt under that provision. When the Act is extended to municipalities, one thing that occurred to me was this, the exemption is for legal advice of Crown Counsel. I am not sure whether the legal advice of a municipal solicitor qualifies because I do not think he can be said to be Crown Counsel. I think the same applies to some agencies, those agencies who are quite far apart from the government but to whom the Act will apply. I do not think that their counsel can necessarily be considered Crown counsel.

So, if that is so, then without an amendment to s.19, there will be an anomalous situation where lawyers who work within government have a greater degree of protection for their information and work that they have done than lawyers who have worked outside the Provincial Government itself. That is something that those of you who have an opportunity to comment on whatever amendments will be made to the Act should keep in mind.

Now, the next issue is one of fees. That Act contains a number of provisions authorizing the charging of fees for information requested. For example, you can charge for search time in excess of two hours at a rate of $6.00 for each 15 minutes. You can charge for a preparation cost that you incur in making records available for disclosure under the Act. You can charge for computer costs if you included them and you can charge for shipping costs as well if you have to send material out. Further provisions with respect to fees are set out in great detail in the regulations. I think you should bear in mind though that the fees do not appear to be intended to allow complete cost recovery of the cost that the legislation will impose on you. At the Federal level, it has been estimated that for each one dollar in fees, there has been $100.00 of real costs. This is for time and expense that you cannot charge for under the Federal scheme. No one knows yet what the relationship between fees and cost will be in Ontario. It is just too early to tell and it probably will not be quite as severe because we can charge for things the Federal system cannot.

However, I think it is important to regard the legislation itself as like a program or a service that you have to deliver but it will involve some measure of no recoverable real cost. Of that, there is absolutely no question. Although the Act allows you to require a deposit if someone makes a request for information and so, through the use of that, you can alert them to the cost and sometimes tailor their request and you can give them that fee estimate.

It is pretty clear that you cannot use the fees provisions of the Act as a deterrent to a request, as well, to ensure it is clear that Mr. Linden's office has ample jurisdiction to ensure that you do not.

Now, I want to speak very briefly about the appeal remedy. The appeal remedy in the Act, in my view, is a strong and effective one and I think it is the most important feature of the legislation. The appeal process is simple. It is accessible. It is free and you do not need a lawyer to bring an appeal. The final decision is that of the Commissioner and in itself is not appealable on the merits although it may be subject to judicial review by the courts under certain limited circumstances.

As a result, what we are seeing to date is that many requestors are in fact appealing decisions made by government if they do not get what they want under the Act. The statistics that we have, and this is just a rough estimate, for every ten requests about half of the people get exactly what they want and of the other five, one of those five ends up at the Commissioner's office. So, we are seeing a great volume of appeals.

I think it is important that your clients understand that there is a review authority out there who is active and who is accessible and that people are using. This is part of the attitude-shaping that we talked about earlier, particularly yesterday. If you end up taking a position that is strictly, 'Well, we won't disclose this.', you may end up in an appeal that will have a lot of issues, take a lot of time and take a lot of money and what will end up happening is that you will loose portions of it and you will be in a position to make arguments that do not have a great deal of credibility. So, I think it is important to keep in mind that there is a check on the system and that today it looks like it is working quite well.

On the question of appeals, I just wanted to make one comment on the notion expressed by Jim Rohman yesterday. Jim Rohman was the reporter from the Kitchener-Waterloo Record. He spoke at the Plenary Session at the end of the day and he said that he preferred the review of courts in the Federal system rather than the kind of commissioner system that we have here and the reason he gave for that was that, in his view, over time the Commissioner's office would be co-opted by the government. It would lose its independence and it would cease to be an effective watchdog on government.

I want to offer a contrary view. I do not think there is any evidence that that would necessarily follow. The Commissioner is an officer of the Legislature. He is like the Provincial Auditor in terms of his powers and responsibilities and his duties and I do not think there is any evidence to show that the Provincial Auditor has been co-opted by the government or that he lacks a degree of impartiality. In particular, the Information and Privacy Commissioner here is, in some respects, like the Auditor General at the federal level. Again, he is an officer of the Federal Parliament and I do not think there is any evidence to show that he is less than independent as well.

So, I do not see that, on the evidence, as being a particular danger but it is interesting to see that view and that being the case, I think that in terms of access, in providing the public with information, a free and quick remedy that is much, much quicker than the courts, and is much, much cheaper, is preferable.

Thank you.

James Chalke

Okay, I think Kathryn has a comment.

Kathryn Munn

I like John's idea of getting access to memos and material written by counsel for the tribunals or by municipal government, the Municipal Solicitor's Office, I had not really thought of that one. I thought maybe solicitor/client privilege might be enough but that is a good angle. I wanted to just mention one other aspect of solicitors working with government and that is to consider helping the government client set guidelines for the release of information. This sneaks into the topic I was going to bring up very briefly for privacy protection. S.42, particularly (f) and (g) for disclosure of information to other governments for law enforcement purposes, within Canada or outside of Canada, can be a loophole you could drive a Mack truck through in the legislation if there are not very clear and narrow guidelines given to the people who are making the decisions about what information is to be released because the person, the individual, about whom the information is collected, cannot or is not necessarily even told whether or not information has been given out. So, there is no way for the individual to find out whether it's even been given, let alone what the information is.

Russell Juriansz

I wrote it down, John. When you are appealing, you do not need a lawyer. This is ----

John Turchin

I shouldn't have said that.

Russell Juriansz

This from the lawyer for the person whose decision you are appealing! No, I think you are always better off with a lawyer! The legislation is complicated and if you have trouble yourself and if the information is so important to you, the decision to release it or not release it, is so important to you, that you are going to appeal, then it is best to have that appeal presented in the most effective way and I think the legislation is complicated enough that a lawyer would be a good idea. Regrettably, lawyers themselves have not seen that and have not become expert in this legislation.

James Chalke

Okay, great. Those are our comments. I would like to invite some questions now. There is a microphone there. It is on.

Gerry van Berkel, General Counsel
Federal Privacy Commission
Ottawa, Ontario

Russell mentioned a hot item. That lawyers within government will become hot items at some time in the future. Perhaps, at my age, I am not worried about being a hot item! Russell, I think is a perfect example of a government lawyer who became a hot item. He was the General Counsel for the Human Rights Commission after I left. While I was there, he handled with great skill, human rights cases. So, I think there is hope for us government lawyers. While I am on the subject of lawyers, I would like to take issue with the gentleman who said that lawyers' opinions and lawyers' notes are protected by the solicitor/client privilege. My understanding of solicitor/client privilege is that it is the privilege of the client and if the client decides that your documents should go out, then they should go out. The whole tenor of this legislation is to give out information and not to try and keep it in. Most of the exemptions are discretionary and the public servant who is administering the law, whose department is responsible for its obeying the law, should be trying to give things out and exercising its discretion to give things out, not to keep them in. A legal opinion that is ten years old is like any other piece of information that is ten years old. It is useless. Unless you can find a very good reason for keeping in information that was given by lawyers, why not give it out? What is there to lose? Once in a while, we, as lawyers, will give bad opinions and we have to suffer the consequences. So, I think that the attitude should be, let's give out as much information as possible. Let's not keep it in. If big business wants to try and prevent information from getting out, let them hire Russell Juriansz and let them fight it out in the courts but I think, as public servants, the attitude should be when in doubt, give it out.

Russell Juriansz

I would like to add to that and take it a step further. Solicitor/client privilege is fine but I have a problem where solicitor/client privilege is claimed by a statutory decision-maker or government that will be taking a decision against your interests and which affects you in a profound way and does it on the basis of a particular legal interpretation and you do not have the opportunity to know what that interpretation is and to point out that it is erroneous or there are competing interpretations and so, I very much agree that from a policy point of view, much of what comes under solicitor/client privilege inside the government should be disclosed.

John Turchin

Well, I will just respond to the two points. With respect to Russell, there may be circumstances, sure, where a client would not mind releasing a legal opinion. Although certainly there is great difficulty getting legal opinions out of the private sector bar as well. With respect to the comment made first, I agree. Clearly the solicitor/client privilege is exercisable by the client. It was not my intention to suggest that it should be used in all circumstances, only that it was a strong exemption and could be used that way, in all circumstances. The circumstances obviously will dictate whether it is in fact, used that way or not.

James Chalke

Just apropos what Russell had to say, I think it is interesting if you look in a number of statutes administered by the Ministry of Health that are related to their various tribunals. One feature that you find in a lot of their statutes is that if a tribunal receives advice from their counsel, it is mandatory under their statute to disclose it to the parties to that proceeding and allow the parties to say, 'This is a crummy legal opinion.' It is not an FOI issue so much but it does come up with respect to the conduct of other tribunals. It seems to be a feature of their statutes primarily and I know, in fact, it is also a policy of a number of other tribunals although not reflected in statute. Any other questions? We must have answered all your questions? No! Good.

Mark Robinson, Branch Representative in Freedom of Information, Ontario Ministry of Community and Social Services

I'd like to ask a question about the third party submission. I dealt with a request from a gentleman whom I determined to represent a well-known cult in North America asking for information about an anti-cult organization and we third-partied the anti-cult organization and I spoke with a gentleman and he said a number of very interesting things including the fact that in Quebec, the cult had harassed people when personal information about them was released, members of the anti-cult organization, was released. He also thought that there might be some threat to us as civil servants from the cult and what occurred to me was, in the submission that the third party made and in the remarks that the third party made to me, the cult would have been very interested in finding out about that. Is there any protection for the third party with respect to the submission they make or notes that I make as a civil servant or statements that the anti-cult organization makes?

James Chalke

I think what you are asking me is, would these written submissions say, of a third party under the notice procedure in s.28, would they be considered a record under the custody or control of an institution?

Mark Robinson

Yes.

James Chalke

In my view, they would. So, they would just be subject to the normal exemptions that any other record would be.

And I think that that is generally of the same tenor that you see in the Commissioner's decisions related to the identity of the requestor. Just because it was on a request form, he just took the perspective that that was a record in the government and viewed it in that context.

Mark Robinson

I couldn't get any clarification at the time from our legal counsel.

James Chalke

That wasn't a legal opinion. Lawyers don't -- that was just a gut reaction. You will get my bill later!

Mark Robinson

If we are talking about assisting third parties, I guess that is one of the things that you have to make very clear to them that, in fact, the submission they make is going to be subject to the same rules and they might want to phrase what they say very cautiously.

James Chalke

Let's make this the last question.

Anne Gray, Coordinator
Freedom of Information and Privacy
Ontario Ministry of Consumer & Commercial Relations and Ministry of Financial Institutions

With respect to something John had said that, as Crown Counsel, given the sort of double-barrelled nature of s.19 of solicitor/client privilege and legal advice, that almost anything that he or a colleague within the Attorney General prepared is subject to exemption. Now, I know the whole issue of what s.19 covers is not settled yet but it is my understanding that legal advice is meant to be interpreted fairly narrowly because lawyers are often asked for policy advice, general advice. Do you actually think, is the inclination that this is a very wide exemption and is going to cover everything you do?

John Turchin

No, I do not think it will cover necessarily everything you do. It is the extra add-on to the common law privileges with respect to legal advice. So, if a lawyer is dealing in a simple policy area, it may not be covered or to the extent that that is advice, it will be subject to the advice and recommendations exemption as well. So, legal advice though is a significant addition to it and I think it will certainly have to be given some meaning and it does take it beyond simply legal advice with respect to litigation.

James Chalke

But I think that Anne has a valid point and that is that there is a technique which is to run things through a legal services department in the effort to have something endorsed or approved or whatever by a lawyer and then you can say it is solicitor/client privilege and I think that that is defective in terms of the concept of whether you are giving legal advice. I mean, giving legal advice is an activity and having the title of being a lawyer does not fulfill that activity. I think, I suspect, that the Commissioner will take an "activity approach", which is to say, 'What were you doing? Were you giving legal advice or was this covered by the common law privilege?", which, by the way, 99 percent of lawyers do not actually really know what the common law privilege is. We throw this around. It is very vague and so, I suspect, that the Commissioner will essentially work on what you were doing as a lawyer in terms of writing that opinion and not, "Are you a lawyer?" Because it is certainly true that a number of things that lawyers do really stretch into the area of policy and operational advice and are not restricted to legal advice.

Okay. Well, that is the panel. Thank you very much for coming.

HEALTH INFORMATION: IS IT ADEQUATELY PROTECTED SINCE THE PUBLICATION OF THE REPORT OF THE "COMMISSION ON THE CONFIDENTIALITY OF HEALTH INFORMATION"?

Frank White

Welcome to our third session this morning. In the late '70s, early '80s, there were two commissions that were formed by the Ontario Government at that point. The first was known as the Williams Commission which investigated the Freedom of Information and Protection of Privacy issues at that particular time and which resulted in the legislation which we have today. There was a second commission that was formed about that time. The Commission of Inquiry into the Confidentiality of Health Information and that short title that became known in Government was the Krever Commission and I am very pleased today to have as our Moderator for this panel the individual who headed that Commission, who was instrumental in producing that report. Would you please welcome Mr. Justice Horace Krever of the Supreme Court of Ontario.

Mr. Justice Horace Krever
Supreme Court Of Ontario
Toronto, Ontario

I am going to begin, if I may, by telling you what we intend to do, how we intend to proceed. I am here simply as a moderator. My job is to introduce, very briefly, the three speakers on the panel and when they are finished saying what they have to say, to invite questions or comments from you, the participants. I am pretty confident that there will be time. I do not intend to take up any time by going into the CVs of the panelists. I shall introduce them by their names and by theoccupation which they carry on. Before I do that, however, just want to make a comment or two that may set the scene, it may not. I do not really think we are speaking about the same interests that are involved in this subject because there are so many interests and that is one of the fascinating things about the subject. It is so multifaceted. I want to start by referring to the report which I had the honour to present to the government, not in 1979 as your program says. It is not that old. It was 1980! The letter of transmittal was dated September 30th, 1980 and I believe that the report was conveniently withheld until the Legislature had recessed for the Christmas Holidays and it was over the Christmas Holidays, when nobody is interested in any news, when it was released to the public. That sounds like sour grapes. It is not really. I was asked a few minutes ago if I had kept count of the number of recommendations in my report that have been implemented and my answer which was a truthful answer, is no, I have not but I think it is easy, I think the number is zero. But after all it is only eight years!

There is one fascinating aspect of my experience that I think I should mention to you which may explain why it takes as long as it does to see the results of a lot of work and a lot of money. It was a lot of money. At the time, it was thought to be a very large amount of money. By today's standards, it was nothing, but it was well over a million dollars. That is the first question the press asks after a Royal Commission is reported and it was thought to be a lot of money. It took a lot of time, almost two years and practically, I should not say practically, everybody who had any contribution to make to the question of confidentiality and privacy had been interviewed by me. Evidence, sworn evidence was given at open hearings and I then reported it. When I reported, there was a lot of flurry in the press. I think it is fair to say that the press comments on the report were all complimentary. Then, I waited to see what the Government was going to do about it and what the Government did about it is what governments apparently always do about it. They created a task force. A task force of one person, a very distinguished physician, hospital administrator, was appointed and what he did is prepare a report in which he listed all of my recommendations and his comment, with respect to each one of them, one by one. The comments were very interesting. They really were the reaction of the people that the report affected, whom the report affected. They were the very same people I had interviewed, exhaustively, who had presented briefs to me. The same people were now asked to comment on the issues which I discussed and their comments were summarized in this report of the task force. The most controversial issue that I had to deal with was that of access to information and I made the astounding, revolutionary comment that as part of a person's autonomy, he or she should be entitled to access to his or her own health information. That was the most controversial, the most emotional issue that was addressed in my report.

The largest part of the ensuing task force report that was eventually released (I did not know about it until I read it in the newspaper) devoted most of its pages, to that highly emotional, controversial recommendation and what it did is it summarized the views of the very people I had spent thousands of dollars interviewing. I knew what those views were. Everybody knew what those views were. They were the same and then, his recommendation. I am sure if I asked you to guess what it was, you would not guess. His recommendation is, this is a very controversial recommendation, "I recommend the creation of a task force to look into it." I do not know if that task force was ever created. I believe it was not. If it was created, it still has not reported. That may be a longer explanation than I intended, why it takes so long to see the fruits of one's labour in some fields. Enough of the background. I am now going to turn to our panelists and the order is not the order in which their names appear in the program. The first panelist is Doctor Richard Schabas, who is the Chief Medical Officer of Health in the Ontario Ministry of Health. Dr. Schabas?

Dr. Richard Schabas
Chief Medical Officer of Health
Ontario Ministry of Health
Toronto, Ontario

Thank you. I think I will begin with a couple of apologies. I will apologize if I appear a little nervous. Like most doctors, I get very weak in the knees when I am confronted with lawyers and legal issues. I guess to some extent we get our revenge in the examining room! Today, I am on foreign turf. Also, I make no claims to being an expert in the legal aspects of confidentiality or indeed on freedom of information legislation. So, what I will do is to try to put the discussion into some practical, real world context by discussing confidentiality issues as they arise from what I think is probably the premier confidentiality issue facing medicine this decade, namely that relating to AIDS and infection with the Human Immune Deficiency virus or HIV.

This, as I said, has been an issue of very prominent concern, both among professional groups and the public. Needless to say, it has been the subject of a number of studies, including one by the Royal Society of Canada, co-chaired by Mr. Justice Krever; a study by the Canadian Bar Association; and a number of more medical reviews. The basic issue of confidentiality related to HIV infection is extremely important. In some ways more important than usual medical information for the following reasons. First of all, there is an extremely high level of public anxiety about this infection. Anxiety, which for the most part is not based on realistic concerns about the way in which the disease is spread, but concerns related to casual contact, workplace contact, school contact and the like, such that there are severe implications or can be severe implications in terms of anxiety on the part of co-workers and the like if the fact is revealed that someone is infected with the virus. Second of all, infection is in fact, appears to be a lifelong condition. There is no cure for HIV infection at the present time and there is no reason to believe that the situation will change. So that a leak of confidentiality, an inappropriate leak of confidentiality really has very long-term implications for the individual.

Finally, because of the epidemiological patterns of AIDS in Canada where at least 90 percent of people infected are male homosexuals, there are conclusions often drawn by the fact of infection, rightly or wrongly, about an individual's lifestyle which, in their own right, can have serious implications. In the light of this and all the concerns about confidentiality, on the other hand, AIDS is a reportable disease under our Public Health legislation, the Health Protection and Promotion Act. What this means is that a physician or indeed any other medical practitioner, operator of a laboratory, administrator of a hospital, or school principal is required by law to report an individual with AIDS or an individual whom they suspect is infected with the AIDS virus to the local Medical Officer of Health.

This is one of those provisions under the Health Disciplines Act, those where required-by-law exceptions can supersede normal medical confidentiality. The kind of information that is required to be reported includes the person's name, their address, a variety of information about risk factors for that individual and indeed, whatever other information the Medical Officer of Health requests. The collection of this information is necessary for two reasons. First of all, to maintain an accurate epidemiological tracking of the spread of this disease in our society and also to ensure that there is appropriate follow-up for individuals who are infected and this can include counselling about a positive test and where necessary, notification and counselling of their sexual partners. In the light of this dual nature, the concerns about confidentiality and the necessity of reporting, there have indeed been pressures to increase the security of confidentiality related to HIV infection.

From the very introduction of the laboratory tests for HIV infection, the antibody test in November of 1985, a special exception was made to the normal pattern whereby a patient's name has to be included on the laboratory requisition. This is not required for HIV antibody testing for two reasons. First of all, obviously, to provide some extra protection of inappropriate leaks of confidentiality and second of all, because initially at any rate, the disease was so closely associated with a gay lifestyle, there were concerns that even applying to be tested would, in itself, represent a breach in confidentiality, an intrusion into the privacy of people being tested. So, for that reason, laboratory requisitions still do not include the name of the individual being tested and in fact, that information is only given to the Medical Officer of Health for those individuals who test positive and in those cases, it comes directly from the testing physician.

There have indeed been calls for anonymous testing. This, in the usual sense, means that not even the physician is aware of the identity of the patient who tests positive. That way the testing is truly anonymous. The only person who knows that they are positive is the patient. This is, in fact, permitted in a number of American states and in the Province of Quebec, although it is not permitted in Ontario because, in fact, it runs counter to the importance we place on reportability.

There has also been what we call non-nominal reporting, --reporting strictly by initials and date of birth to allow epidemiological tracking, but not introducing specific personal identifiers into the public health system. This, in fact, is tolerated by most Medical Officers of Health in this province, if they are satisfied that adequate counselling and partner notification has been provided by the family physician. Again, as an added safeguard to confidentiality. Many doctors still feel faced with a dilemma relating to HIV infection, the dilemma between what they see as their obligation to their patient and their obligation to society at large and this is perhaps most sharply focused in a case where doctors have a patient whom they believe is not acting responsibly with regard to the disease and certainly, the law gives them provision to report this to the Medical Officer of Health, but I am not sure that all doctors see the issue quite that clearly.

The experience in Ontario - just to give you an idea of the numbers - there have been more than 100,000 HIV antibody tests performed in Ontario in the last three years. There have been more than 5,000 positive tests and more than 700 cases of clinical AIDS. Those represent about 40 percent of the national totals and I think in that context, there have indeed been extremely few inappropriate breaches of confidentiality related to HIV infection but, unfortunately, the record is not perfect. Although I would suggest that most of the inappropriate breaches have come from non-medical sources, certainly two episodes that gained national attention were ones in Ottawa and in Halifax where there was wide-spread local publicity about individuals who were felt by the police to be responsible for irresponsible behaviour that might spread the HIV virus. I am sure many of you recall the incident of the Ontario doctor who was suspected of being infected with HIV but, unfortunately, had that issue discussed on the front pages of our newspapers. Indeed, one celebrated case in Nova Scotia did represent a leak from medical sources, although not from the reportability aspects under Public Health but indeed from the doctor's secretary who felt it was her obligation to let the community know about a teacher who was HIV infected.

These incidents, while I think they are relatively few, are certainly particularly distressing because of the wide-spread publicity and attention that they attract. It is distressing to public health officials because we feel that it undermines the safeguards that we are so conscious of putting in place. It is distressing to physicians because in their mind, I think it sharpens this dilemma that they feel between obligation to the patient and obligation to society and furthermore I think it is distressing to people who may be infected with the virus because it tends to discourage them from coming forward and being tested.

What are the special concerns about HIV infection and freedom of information? Well, since this information the reportability of HIV infection, is reportable to the local Board of Health and ultimately to the Ministry of Health, it is at both those stages included under Freedom of Information Legislation and I think there is legitimate debate as to whether in fact that should be a party to freedom of information or whether in fact there should be consideration given to exceptions related to this kind of medical information. As well, I think there are concerns that out of the present legislation that pressure can be exerted on Local Medical Officers of Health, Chairmen of Boards of Health and indeed within the Ministry of Health, to release this information inappropriately and I think it must, as part of our review of the impending legislation, we must be satisfied that there are adequate safeguards in place to prevent any inappropriate release of this information. In addition, I think there has been a discussion about the need for other kinds of safeguards. Safeguards that go beyond traditional medical confidentiality and beyond freedom of information to limit the damage of those few, but perhaps inevitable, leaks of confidentiality which do occur and indeed, there has been some suggestion made that provisions banning publication of the names of people infected with AIDS or indeed other communicable diseases be put in place similar to those provisions related to the Young Offenders Act.

In conclusion, I think that as our knowledge of AIDS and HIV infection matures, I think our ability to handle the information in a confidential and appropriate manner is also maturing. I think our record in Ontario and indeed, in Canada in general, has been very good but it has not been perfect and I do not think that there is any reason for complacency. I think particularly as we look at the introduction of Freedom of Information legislation, we have to be absolutely assured that the safeguards are there to protect the confidentiality of this and other sensitive medical information. Thank you.

Mr. Justice Horace Krever

Our next speaker is Mr. Gilbert Sharpe, the Director of Legal Services for the Ontario Ministry of Health.

Gilbert Sharpe, Director of Legal Services
Ontario Ministry of Health
Toronto, Ontario

Richard, you did very well. You sound like a lawyer! I would like to start by telling you that some of the things I say are my own views and not necessarily those of the Ontario Government. No one ever believes that somehow. I like to say it anyway. Tell my superiors later on that I did come forward with a disclaimer. You heard it, Steve. Okay. It is really a great pleasure being on a panel with Mr. Justice Horace Krever again. Many of you, of course, or all of you now know his important work with the Royal Commission several years ago. Some of you may not know the fundamentally important work he did in the late '60s on the Committee of the Healing Arts that gave rise, ultimately, to the Health Disciplines Act and that Act is now under review and, hopefully, we will have a new Health Professions Code in the next year or so encompassing about 25 professions. Mr. Justice Krever really has been at the forefront of two very important studies in the last 15 or 20 years -- that one, which as I say has given rise to important legislation and the second, which despite perhaps a bit of his pessimism I think will, in short order, also see the light of day in very important laws.

I thought what I would do in 15 minutes or so is give you my own impressions of what has been happening in the whole confidentiality front and particularly the area of access to records. Historically, I think it has been the prevailing view by professionals, particularly physicians, that patients have a right to know what is happening to them. This is part of the notion of informed consent with the right to have access to information about their care and treatment, but the form in which that disclosure is made is within the purview of the provider of the service. The provider owns the record. The access may be through seeing the record but it may also be through discussions, a report, a letter, answering questions, whatever. I can recall over the years various problems that have been come up as a result of that philosophy. One of the most critical has been the notion of requesting patients to consent to third party access, insurance companies for example. One signs a release and usually a copy of records or information is provided and of course, the anomaly that the patient has signed a consent to disclose records to someone where the patient himself has not had a right of access to see what information they have agreed to disclose, is very problematic, particularly since much of what may be in the record could, if known to the patient, be detrimental to, for example, gaining insurance or whatever and that notion of informed consent in the context of a consent to disclose information has, in my view, been ultimately or would be ultimately fatal to any perceived protections that that signed consent form would hold to apply to the provider.

Now, I guess it is about two years ago, Ian Scott brought Bill 7 through the Legislation and one part of Bill 7 involved amendments to the Mental Health Act to provide access to psychiatric records by patients. Those of you who recall the discussions some years ago about access rights and the opposition of the medical profession, in particular in hospitals, will remember many great concerns surrounding psychiatric data being very sensitive information. Physicians would usually put this forward as their greatest concern and their best example of inappropriate access rules and so on. Although I know that David will address this in a bit, it has been my perception that in the two years that psychiatric patients have had a right of access to their records, there has not been any great concern or great problems. In fact, most psychiatric facilities have, if not patient advocate programs, rights advisor programs that ensure that patients are aware they have a right to demand to see their records and notwithstanding that, I do not believe that there has been a very great demand and I think it has been Mr. Justice Krever's experience, I think when your team went to Washington to St. Elizabeth's that that was their experience as well, south of the border. So that the great concerns that have been expressed over the years have not come to pass in one of the more sensitive areas in access to records.

Now, there is in the Mental Health Act a provision that permits the hospital physician to withhold access in the event that there is perceived serious harm to the continuing treatment of the patient or some third person. I don't believe that that provision has been relied on very much but I think it is important to have that kind of exception for the very rare situation where it is necessary to protect certain very sensitive information that could be potentially damaging or harmful but even there, we have strived to put the onus on the people seeking to protect the record to establish their case that there should be a ruling to withhold information.

Now, as you know, the present rules, by and large, deal with records -- deal with the written and not the spoken word. They protect, under the Public Hospital Regulations the medical record; under the Mental Health Act, the clinical record. The protections address what is written down in compilation format and if that information that is written down is appropriately released initially with the consent, say to an insurance company, generally there is no continuing protection to ensure that the person appropriately receiving the information does not inappropriately pass it along to someone else or use it improperly. That very narrow type of legislation that we have, in my view, is flawed and as you will see in a minute, I think there are some things that have to be done in a more comprehensive way to correct that.

There are a number of initiatives or a number of concerns that have been expressed or are underway that I think are worth mentioning. I refer very briefly to the work of Alan Schwartz's committee that is proposing comprehensive amendments to the Health Disciplines Act to bring in a whole host of new professions and give them licensing stature and so on and apropos of some of the recommendations of the Krever Commission, and some current provisions in the regulations under the Health Disciplines Act, I think it is going to be very important that that group focus on expanding the concept of professional misconduct insofar as it applies to improper disclosure of health care information to ensure that there are professional sanctions that could be imposed on any of these groups for improperly disclosing information and there is going to have to be a comprehensive set of rules set out, not the simple ones now, for example, under Health Disciplines that talk about how it is professional misconduct to disclose information without consent unless required to do so by law. That is a very simplistic statement that really does not take into account a whole host of subtleties that now exist.

There is also a concern that has existed for a number of years, and I know that various briefs have been put before the Ontario Government over the years, on the question of professional privilege and that is the ability of a health care professional to ensure their patient that confidential disclosures that are made by them will not be disclosed even in court and clear examples of areas of real concern and conflict exist, for example, in family counselling that may ultimately lead to divorce and a custody battle where one or both of the parents have been involved in therapy and disclosures have been made that should be potentially very damaging if brought out in open court. There are all kinds of examples that one might think of. Most states and about half of our provinces have, in their evidence laws, specific protections for this kind of information so that assurances can be given to patients by health care professionals.

In 1978, in the Ontario Mental Health Act, we did put a kind of qualified privilege in where, for psychiatric records, one could attempt to block disclosure in court where there is a perceived harm to the patient or someone else and we have given the Court the authority to override where essential in the interests of justice. It is my view that these are the kinds of rules that one should look at expanding and perhaps applying across the board. Now, the final effort, and I stress that this at this point is really my own view, is that we really must move fairly rapidly towards omnibus confidentiality laws, uniform laws that will implement many of the recommendations of Mr. Justice Krever's Commission and that will take into account many of the new developments in the health care sector. Developments such as interlinked data computer systems that one talks about where linkages will exist between hospitals and other health care institutions and providers. Clearly, there is going to have to be some legislation that recognizes and permits this kind of access to information that perhaps classifies the information that is stored in the system according to sensitivity. Of placing higher obligations in terms of secrecy with stiffer penalty provisions the more sensitive the information is, and making it more difficult to retrieve if it is more sensitive, and so on.

There has also been a lot of talk and in fact, I understand there is some use being made now of electronic signatures in many centres around the province. Again, there really is not any kind of statutory framework to reflect and recognize and permit and protect the confidences involved and the safety of patients and their care where this type of signature is being used. The present rules in a comprehensive fashion are basically non-existent or at best inconsistent or haphazard. There are not rules really that apply to many settings such as nursing homes or Homes for the Aged and many health care settings where very important work goes on. There are really no fundamental rules dealing with access to records, with privacy protection and with confidentiality. With the full implementation next year of Freedom of Information laws, it is going to be essential, I believe, to develop omnibus confidentiality rules that apply consistently across the system, that apply to the unique problems of health care providers and that have universal rules of access and privacy protection. In this regard, I am associated with a group -- some of you may have attended some of the conferences called the Canadian Institute of Law and Medicine.

There is a conference planned at the OHA Centre in March to examine what an omnibus confidentiality health care statute might look like and in the next few months, I hope that you will be receiving more information on that. In any event, I look forward to your questions and over the next few months, to a very comprehensive consultation process to speak about the most useful rules that we should be developing that are both sensitive to the needs of health care professionals and, at the same time, protective of the rights of the health care consumer. Thank you.

Mr. Justice Krever

Our last panelist is Mr. David Giuffrida, the Legal Advisor to the Psychiatric Patients Advocacy Centre in Toronto.

David Giuffrida, Legal Advisor
Psychiatric Patients Advocacy Centre
Toronto, Ontario

Thank you Justice Krever. I am Legal Counsel to the Psychiatric Patient Advocate Office which provides advocates to protect the rights of inpatients in the 10 government owned and operated Provincial Psychiatric Hospitals and that pretty well defines my area of expertise, if any, in the area of file access and protection of the confidentiality of patient records. Because the topic of the panel today concerns confidentiality, I am going to refrain from commenting further than beyond Gilbert's comments on the delicious irony that the most disordered patients in Ontario have, for almost two years now, had a right of access to their clinical records whereas people who enter a public hospital for a simple operation have no right of access and yes, that is something that needs to be put right and we have learned that almost eight years ago.

Now, what I do want to do is comment on what problems remain as far as ensuring the confidentiality of psychiatric records in particular and health records in general and I think the tone necessarily attendant upon a list of deficiencies, that will remain tends to create a picture of serious problems. So, I should preface my remarks by saying that, in my experience, most hospital staff are very seriously concerned about patient confidentiality and very respectful of it and particularly people in charge of clinical records departments seem to be the most keenly aware of the provisions of the relevant legislation including the Mental Health Act and most keenly aware of the need to protect confidentiality.

We do have a number of problems though arising from the fact that we have a patchwork of legislation now with many omissions. We start with the Freedom of Information Act, which I think by the admission of the framers of it, is not an excellent vehicle for regulating the collection, use and disclosure of clinical information because, for example, if you have a right of access under a piece of legislation and you have a therapeutic exemption that access can be denied based on an apprehension of harm to the treatment or recovery of the patient or serious physical or emotional harm to third persons such as the exemption we have in the Mental Health Act, it's useful to have some clinical expertise in the panel that you set up to arbitrate those disputes. Will that be the likely result? Who decides that? Does a lay person decide that? Does a lay judge decide that? Under the Mental Health Act, we have a Review Board panel consisting of a lawyer, a psychiatrist and a person who is neither a lawyer nor a psychiatrist. In the rare case where a patient has sought access to their record and the hospital has had any of the concerns I have described, it is ultimately left for that Board to decide and they can bring some expertise to bear.

In addition, the Freedom of Information Act applies to the agencies set out in the early sections of it. It applies to government. It will eventually apply to municipalities, school boards. You can imagine there is a whole lot of clinical information in data banks across Ontario that is not so defined and for which there is no right of access under FOIPOP and for which the confidentiality provisions of FOIPOP do not apply. Most notably, all the public hospitals to the extent that they are also scheduled psychiatric facilities, the Mental Health Act provisions apply to them, but the provisions of the Freedom of Information Act do not.

Now, looking in more detail at the protection of privacy of psychiatric records, we came upon the right of file access by a procedure which made sense if you were there at the time. The result obviously does not but, at the time, with Freedom of Information before a committee of the Legislature and Bill 34, it was readily apparent that some patients in Ontario, those whose care is entrusted coincidentally to government hospitals, were going to have the right to see their clinical records and other patients who were in public hospitals were not. That is, the patients in the ten government hospitals would have a right of file access under the Freedom of Information Act but people in psychiatric care, even, in public hospitals and there are thousands of psychiatric beds and psych wards of general hospitals, would not have a right of file access. So, file access was pulled out of the Freedom of Information Act and s.65(2) says that this legislation does not apply to a clinical record under the Mental Health Act and the right of access was put under the Mental Health Act.

Now, one consequence that flows from that is that if we look at the Freedom of Information Act, it regulates not just the disclosure of clinical information, it regulates the collection and use of it as well. The Mental Health Act does not. So, for example, the Freedom of Information Act tells us that personal information can only be collected in certain circumstances that are authorized by law and are necessary for the conduct of a lawful activity and, with some exceptions, can only be collected from the person it is about, unless that person authorizes another manner of collection. There is no similar provision in the Mental Health Act and, as we will discuss, no similar provision in the Public Hospitals Act. Now, we may not wish to have such a rule. We may wish to have a modified rule but it is something that we currently have not addressed at all. So, that it is open for health care providers to contact family and friends of a patient not for the purpose of disclosing clinical information to them, because that is fairly well regulated, but for the purpose of collecting information from them and have we fully considered the impact of that and are there any restrictions we would like to place on that?

One of the problems of collecting such information is that in the process of collecting it you must reveal to the person you are calling the fact that the patient is a patient in your care. Is that itself a breach of confidentiality? Even when you are about the business of collecting information. Now, if we look at the Mental Health Act, the new section, s.29(a), the one that creates the right of file access but I want to look at the section that has been with us for some time, s.29 that creates a general presumption of confidentiality except as provided in s.29(3) and (5) and s.29(a), no person shall disclose, transmit or examine a clinical record. That's a very blanket exemption. The definition of a clinical record is a broad one. The term "clinical", as opposed to medical record, was used because the record kept of psychiatric care in this sort of setting is a multidisciplinary record and it includes input from social workers, nurses, as well as physicians and it means the clinical record compiled in the psychiatric facility.

So, except as provided, no disclosure of the clinical record. Well, what are some of the exceptions? It can be disclosed to the patient where the patient is mentally competent or not mentally competent to someone authorized by the patient or an authorized substitute under the Act. Now, it can be disclosed to any person employed in or on the staff of the psychiatric facility for the purpose of assessing or treating or assisting in assessing or treating the patient. It's a fairly intuitive section but one that has still given rise to some interpretation problems and it can be sent between C.E.O.s of health facilities in appropriate cases and there are research provisions as well, provided the record is suitably anonymized.

Significantly under s.29, and Gilbert has alluded to this, is a provision whereby the confidentiality of a psychiatric record can even withstand a subpoena, and very little can withstand a subpoena. So, if a record in a psychiatric record is subpoenaed, it is open for the physician to respond with a Form 15 telling the court that disclosure of this information to the court could result in some harm to the patient or to a third party and the court must hold a hearing within a hearing to determine whether that is true and if it is true, only bring the record into the proceedings if it is in the interests of justice to do so. So, it is a very special sort of exemption we have in the circumstance.

Despite the detailed provisions I have outlined above, there is nothing in s.29 regarding who has a right of access to the clinical record of a deceased patient and one can imagine situations where it is legitimate that the survivors of a patient who died, in the minds of the survivors say, in suspicious circumstances or in circumstances that bear further investigation, and they may wish to look at the record. One can conceive of circumstances where yes, that is a legitimate interest in looking at the record of a deceased relative but does that mean that the Executor of the estate of a deceased relative should have the right to look at the most private revelations to their psychiatrist that may have no bearing on the circumstances of their death? Should we have anything regulating that at all and we are left with some ingeneous, bordering on perverse interpretations, that well, with an incompetent patient the nearest relative can have access and if you are dead, then I suppose you are incompetent! Have you ever heard that interpretation, Gilbert? That has floated around. We shouldn't be left to having to make interpretations like that.

Jumping ahead to the Public Hospitals Act, they ironically have a right of access to the Executor of the estate of the deceased person but they do not have a right of access if the person is incapable. A case in Ontario law where the wife was comatose and the husband, this is Meyers v. Wellesley Hospital, and the husband wished to look at the medical record of his wife who is comatose in hospital but she was not dead yet and the court, to its credit, imposed a purpose of interpretation on the provisions of the regulations to the Public Hospitals Act and did allow him a right of access, but it was not clearly in that regulation.

My point is that -- how does this have a bearing on confidentiality? If you have a broad exemption, you say no person shall see, well it becomes obvious that there must be exceptions not contemplated in the legislation and we are left to figure out what those exemptions are and there is the risk that our personal view of what they must have had in mind, of the exceptions that they must have had in mind, will be broader than perhaps they should be. So, for example, s.22 of the Mental Health Act says that if a voluntary patient goes AWOL the police can bring them back. It does not say you can tell the police. There is a Form 9 that is the notice form that is used to tell the police. The police may rightly say, 'Okay, well can you give us a description of this person to help us in locating him? Can you tell us where the likely places are that they might go so that we can try to find them?' Can you do that? I do not know if you can under the Mental Health Act but it kind of makes a mockery of that section if you cannot.

There is uncertainty as to the character of mental health records. When is it a record under the Mental Health Act? Does it retain its character when it is sent to another arm of government or when it is sent outside of government? I think certainly once it is sent outside government, it is quite clear that you lose any claim on the confidentiality provisions that might otherwise apply to it but if someone is shifted back and forth between a mental health facility and Corrections, as happens when someone is put on a Warrant of Remand, for example, and Corrections requests a copy of their clinical record. If that record were later subpoenaed from Corrections, does the opportunity of the attending physician to respond with a Form 15 to resist the subpoena, does that apply now that it is in Corrections rather than in a mental health facility? There are unanswered questions.

Now, there has been a lot of public attention lately concerning the inter-action between the confidentiality of the individual and the interests of public safety. Many cases that are in the headlines now are subject of inquest. There was a tragic case last spring, in which a 14 year old girl in St. Thomas almost died after a serious assault apparently at the hands of one or two patients under Warrants of the Lieutenant Governor. The Government set up a body to report on the assessment of Risk Management Systems for patients on Warrants of the Lieutenant Governor and that report just came out last week. Recommendation number six says:-

> *"That a system wide procedure be developed for notification of police about patients on Warrants of the Lieutenant Governor. The procedure should identify what information is to be released and give direction concerning the patient's consent for such release."*

I think it is a sound recommendation that guidelines should be developed but there is no guidance in the legislation as to what is authorized and one mechanism that is used by the Lieutenant Governor's Advisory Review Board is to make it a term of the patient's warrant that if they want the warrant loosened so that they can re-enter the community, they must consent to disclosure of that fact to the local police department. That is a coerced consent. That is not a consent. So, it is not a satisfactory solution to it. If your liberty is dependent on signing a consent it can hardly be said that that is a free consent.

Gilbert alluded to the problem of a patient consenting to the disclosure of a clinical record to third parties when the patient, him or herself, is not aware of the content of that record. I spoke to a psychiatrist, a very conscientious one in a meeting last Friday, who told me of receiving, on three occasions, an authorized Form 14, the form under the Mental Health Act for disclosing a clinical record from a patient to a third party, in this case the defendant in a civil litigation matter, perhaps motor vehicle litigation where the insurance company for the defendant wanted to see the clinical record and the patient had just signed the release. That was all that was legally required, I suppose, of the doctor to ship it off to the insurance company. Instead he called his patient first and he said, 'Do you really want the insurance company to know my records of the time when you were so anxious about the affair that you had a couple of years ago?' 'Oh no, I don't. Of course not.' The patient withdrew the consent. How many doctors would have done that follow-up call to the patient to ensure that they knew what was going to be sent to third parties?

It is a routine matter, again, with psychiatric patients to establish their eligibility for income maintenance plans like Family Benefits, to establish their eligibility for certain housing programs, for these agencies wanting to have clinical information about the patient. Well, what is the least they need to know to make the determination they must make? In recent years, it has been the case that they would want access to the whole clinical record and would ask for a Form 14 to be signed to that effect. I know one hospital where the social workers have made real gains in confining it to the discharge summary rather than giving broad access to the Family Benefits office of the whole clinical record. But whose job is it to make sure that that access is restricted to a "need-to-know" basis? It needs to be more rationally defined.

Under the Public Hospitals Act, there are again many holes. The definition of medical record is at variance with the definition of clinical record under the Mental Health Act. I will wrap up in the next couple of minutes. That does not include nursing notes. So, for example, a literal reading of it tells us that nurses do not have access to the medical record and a literal reading of it tells us that there are no confidentiality provisions that pertain to nursing notes. The only confidentiality provision would be a very vague one under the Health Disciplines Act regulations affecting nurses.

There is no equivalent of s.29(6) in the Mental Health Act which would entitle a physician in a public hospital treating a patient for a physical problem to resist a subpoena according to the circumstances outlined above about apprehended harm to the patient. Again, just to touch on the problem of computerization of medical records. If the only person who is meant to look at a clinical record is the person who is assisting or assessing or treating the patient, how do you manage that when you have a computer terminal glowing on many different wards of a hospital and you have access provisions which would permit any person in the hospital to punch up the record of any patient in the hospital? Have we adequately monitored that?

Time will not permit me to go into any depth into a final issue that is troublesome to anyone dealing with disordered people or marginalized people and that is the situations in which you apprehend there is a duty to warn because of apprehension that the patient may harm him or herself or harm another person. The 1975 California case of Tarasoff held that a psychiatrist that had actual knowledge that his patient had an intention to harm a female student and in fact, the person did go on to murder that student, that psychiatrist had a duty of care to take reasonable steps to warn that student and in fact, the fact that he warned the campus police was inadequate in that case. We have not had a Tarasoff case exactly in Canada. A commentator said there is no reason to believe it would not follow along the same lines in Ontario.

There is an Ontario case in which a Probation and Parole Officer placed someone coming out of prison into a boarding house. The landlord said, 'Is he reliable?' and he answered yes. The man burned the house down resulting in the loss of one life and the landlord sued and said, 'Why didn't you tell us he was an arsonist?' The case was statute-barred because they took too long to sue but the Judge went on to say, 'Had it not been statute barred, he would have imposed a duty on the probation officer to fully answer the questions of the landlord to disclose that relevant information.' So, since the court seemed to be telling us that there are some cases when you will have to breach confidentiality because of apprehended harm, we know that we have to sometimes -- we do not know when we have to and we need to have guidelines to assist us in that regard. Thank you.

Mr. Justice Krever

There was to have been a 15 minute period for questions from the participants. My experience has taught me that there are two things you cannot believe. One is that confidentiality can be fully protected and the second is that speakers will fulfill their promise to limit their time!

It is almost twelve o'clock. There is just one last word. It is a commercial. I am going to take advantage of my position right now to make this commercial. Gilbert Sharpe made a commercial about a forthcoming conference he is promoting. He referred to two reports that I have been associated with. He did not refer to the most recent one. I am just going to mention it because it was, in fact, relevant to Dr. Schabas' discussion about AIDS and confidentiality. This disease is such that many of the existing provisions about recording and testing and so on, really are not appropriate because of the special nature of this disease. I do not want to say any more than that but I do want to say that if you are interested in the subject, I do recommend that you look at the report published this year, a report with which I have been associated called, "AIDS: A Perspective For Canadians" and it was a study done by the Royal Society of Canada. I commend it to you. I have it in my hand. This is Professor Flaherty's copy which I am demonstrating with. If you are interested in the subject, you will find a full discussion of some of these impractical problems in it and I think, Mr. Chairman, with that, this panel discussion is finished. Professor Flaherty?

Professor Flaherty

I am delighted that we are going to have a few minutes for questions because it seems to me this subject is just too important to let go. I have left my notes behind me, so I will be fairly brief. I am extremely upset by Dr. Schabas' description of these two unfortunate disclosures of the names of AIDS carriers. It seems to me and I do not mean to say you thought it was a cavalier matter and that you could just forget about it or anything like that, but it seems to me this is an example of an area where the record of the data custodians has to be absolutely perfect. We can't have room for mistakes. There has to be severe civil and criminal sanctions, but ethical review of anything that happens in this area and when you hear stories like this, it is another example of why the general public doesn't trust the government with any kind of information, never mind Chief Medical Officers and this kind of setting.

My second point would be that it is extremely important in this area that all these medical issues not be left to the medical specialists, either the physicians, the nurses, the bureaucrats, the administrators or whatever. What I am concerned about is that this -- you talk about omnibus confidentiality statutes and so forth. I think it is centrally important that the Office of the Information and Privacy Commissioner play a critical consultative role in the development of any kind of legislation or policy of this sort. We finally have in Ontario, legislation. We finally have an office where there is some expertise being developed as there has been for almost 20 years in many other civilized countries. It is essential that that office not be bypassed in the formulation of solutions for all of these kinds of problems, especially in the medical, psychiatric field.

Finally, we always act in Ontario as if this is the first time the problem has ever occurred anywhere. Other jurisdictions have 17 and 18 years experience. Quebec has six years of experience. Many American states, despite their lousy privacy protection schemes, have sectoral legislation of the type you are talking about here, that has 15 and 25 years of background. The states like Hesse in West Germany which are the size of Ontario, have excellent expertise in a lot of these very specific kinds of problems you are talking about and the Privacy Commissioner's Office in Ontario or the Federal Privacy Commissioner's Office are regularly in touch with these people and can sort of share solutions to these very, very sensitive public problems. Thank you.

Dr. Richard Schabas

I will maybe just briefly respond to the first point because I certainly share the distress as I think I expressed about those revelations but I think that we have to recognize that knowledge or information about a disease like AIDS is not the exclusive property of medical records and, just as an example, the case of the Ontario doctor that received such publicity about ten months ago. In fact, the chain of events there was that the family of a patient knew that this doctor was alleged to be homosexual and that he had died of a debilitating illness and suspected it was AIDS, contacted a newspaper which printed that allegation on its front page, made that the subject of debate and it was only later, with the consent of the family that the whole issue was subjected to a coroner's investigation and the matter finally resolved. But I think we have to recognize that there are and, as I suggested, there may well be a need for confidentiality provisions that go beyond medical records to prevent exactly this kind of problem.

Mr. Justice Krever

Any other questions or comments?

Frank White

If I could have a really big hand of applause for our panel? Thank you very much.

PRIVACY: SOME COMPARATIVE ISSUES AND WHAT THE FUTURE HOLDS

David Flaherty
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My name is David Flaherty and I am the Moderator of this particular panel. I am excited as someone who has long been a fan of promoting Freedom of Information and Access to Information and Privacy Protection in Ontario to see so many people here. I take that as evidence of the kind of enthusiasm, commitment and talent that people in this room are bringing to the implementation of the new Ontario Legislation as well as those of you who are here from other jurisdictions and the kind of work you are doing.

We are having a three person panel today. Regrettably Ann Laberge of the Commission d'accès à l'information in Quebec is unable to be with us. She has been promoted to being a member of a Police Commission in Quebec which oversees the work of the police and given some of the antics of the Montreal and Sherbrooke police in recent years, I know we do not want to keep her from her tasks. We have two speakers who are going to speak. I am also going to speak. I volunteered myself when there was a void in this panel. My friend, Gerry Van Berkle, who is the Federal Privacy Commissioner's Legal Advisor, I am delighted to see. He just came into the room. So, I wanted to make this joke at his expense. He said he could not stand to go to a conference on privacy where I did not speak. So, I quickly filled the breach.

Ann Cavoukian is going to speak. She is the Director of Compliance for Sid Linden's Information and Privacy Commissioner's Office. I think of her as the privacy guru for the office. She has a background as a psychologist and she was formerly Director of Research for the Ministry of the Attorney General, which means she has been around lawyers all the time, knows how to work with them but is not intimidated by them.

Connie Mahaffy is to my immediate right, and is currently the Coordinator for Privacy and Access to Information for the Ministry of Corrections. She tells me she has processed 100 access applications since January 1st. She also told me, in a moment of weakness, that she has had 12 jobs in 12 years with the Ministry. I presume that is a sign of her talent rather than an inability to keep a job and I hope she stays in this current job, given her talent, for a period of time. 800 applications, I cannot even count! She was most formerly and this is quite enticing to me, until recently the Senior Assistant Superintendent of the Mimico Correctional Centre in Toronto. So, when she talks about certain aspects of electronic monitoring in the correctional services, it sounds like she knows what she is talking about.

I am going to give you my -- what I call my scare speech. It is a bit alarmist. The title of it is, "The Emergence of Surveillance Societies". Some of you who have heard it before, it is the theme of a book I am in the process of publishing called, "Protecting Privacy In Surveillance Societies". It is a serious academic study of how privacy and data protection laws were implemented in five countries. There is an article by me in the forthcoming Government Information Quarterly with the same theme. In terms of introducing myself beyond that, I realized as we were sitting preparing, that I started working in privacy protection in September of 1964, which despite my youth, is an indication that I have spent more than half of my life working on these kinds of issues.

I've also given this presentation in French in Montreal last week. I'd be pleased to answer questions from any members of the audience who would prefer to ask them in French.

The part of my speech that I am not going to give to you goes on and raises some questions about the quality and capacity of data protection commissioners and privacy commissioners and so forth of various countries. It is not something that I have time to do today but I am happy to tell you that my general opinion is that the three Canadian systems are not only very good laws but they are functioning quite effectively, at least to date, because there are enthusiastic and competent people trying to run these offices.

So, to my theme of emergence of surveillance societies and I apologize a bit for the somewhat alarmist tone of this but it seems to me that such a small group of people working on privacy and data protection that we have to sort of keep up at a sort of very engaged, what the French call an "engage" level to really do this work seriously. What I am attempting to do since the panel is supposed to look into the 1990s and beyond is give a theme that I think I get from looking at various countries that I think is quite relevant to sort of the motivation we need to do this kind of work. The central theme to my brief presentation is that individuals in the western world are increasingly subject to surveillance by databases in the public and private sectors and that these developments have negative implications for the quality of life in our societies and for the protection of human rights. Moreover, despite the advent of privacy and data protection laws in response to such concerns, there is some evidence that we have created only the illusion of data protection.

Western industrial societies run the increasing risk of becoming, or may already be surveillance societies, as one component of being information societies. Various automated databases now in existance facilitate surveillance of individuals. The threat to the right to be left alone is serious since only partial regulatory solutions have yet been achieved, especially for the private sector in North America. The database of the Credit Bureau of Greater Toronto, for example, monitors factual credit information of six million residents of Ontario and I can tell you parenthetically, it was quite an epiphany for me to be taken to a room with 120 women, sitting behind computer monitors a few blocks from here, watching the fact that they monitor on a continuing basis the six million people who live around here in terms of their credit information and credit history. When you have one of the records of one of those persons flashed up on the screen, it really gives you a sense of what a surveillance society means.

Another Canadian example. Approximately ten percent of the adult population appear in the national police computer known as the Canadian Police Information Centre or CPIC. In the United States, the five largest consumer credit companies each maintain records on an average of 120 million consumers. In every country, federal and state governments maintain large numbers of databases that keep different segments of the population under observation. Some of these forms of surveillance are, of course, quite legitimate in a democratic society but their cumulative impact on individual privacy is negative.

In this age of automation, detailed governmental surveillance of individuals can be carried out either at the time of applying for or complying with a program or on an ipso facto basis. That is, after the fact. The personal histories of individuals are available for scrutiny at any time and aspiring bureaucrats are constantly inventing new ways of using existing data for other administrative purposes, whether to enforce an agency's mandate or respond to new governmental or legislative directives or for law enforcement. (When I saw this sentence yesterday, I was a little nervous about saying this to a group of aspiring bureaucrats.)

Faced with continued Palestinian unrest in 1988, the Israel Government order 400,000 adult Gazans to replace their old identity cards. As they applied, secretaries punched their identity card numbers into IBM computers which instantly displayed outstanding tax obligations, arrest records and other data. The process illustrated the capacities of mass surveillance in today's world. Credit card companies maintain on-line databases that not only profile the activities of millions of users on an ongoing basis, but also make it possible to locate their whereabouts at specific times as on-line card verification occurs. Credit card companies watch what people purchase. For example, an American lawyer of my acquaintance returned from vacation in Paris and was informed by her bank that someone, in fact herself, had been purchasing clothes abroad with her credit card. She is upset by what she perceives as a surveillance of her own activities.

Banks have similar monitoring capacities through the buildup of personal profiles for various purposes and the increased use of automated teller machines. Other examples of technological innovations with implications for governmental surveillance are more exotic but nevertheless representative of the scale and pace of innovation. The Hong Kong Government has plans to monitor the movements of 230,000 local automobiles by means of uniquely identifiable emitting devices attached to each car which will trigger an automated response and assign variable fees for the vehicle's use of the road at certain times. Such a computerized information system could easily be employed as well to monitor and store data on the physical movements of the population. Even in its current mode, data produced for the control of road use should be segregated from other administrative uses.

In a similar development, various correctional agencies want misdemeanor offenders serving sentences at home to wear an electronic bracelet which emits a digital code enabling the authorities to monitor their movements. Such electronic monitoring devices are becoming common in North America. Consider as well the invention of optical storage devices for mainframe computers permitting lasers to store massive amounts of personal data in digital form. A single optical plotter can store four billion characters of data comparable to 40 reels of magnetic tape. They can be transferred to a host computer at the rate of 30 million characters a second.

Since optical memory storage is not erasable, these records cannot be corrected if errors are discovered entered on individuals, which is contrary to Fair Information Practices. The huge storage capacities of the newest computer facilitate surveillance since it so easy and relatively cheap to store and access large amounts of personal data. IBM has announced a four megabyte memory chip that is capable of storing more than four million pieces of data on a chip which is about a quarter inch to a half an inch. Sixteen full pages of the New York Times can be stored in an area about the size of a period at the end of a sentence and could be read from the chip in about a quarter second.

Each day brings announcements of major developments and cheap data storage to make it possible, for example, to purchase the telephone books of all major cities in Canada on a few floppy disks. Such data can be organized, enriched, linked and retrieved with considerable ease in order to build profiles of individuals. Individuals, in my judgment, correctly sense that such activities pose serious risks to privacy interests.

In the 1960s when large computers first became common, the major apprehension most notably in the United States was the creation of one great national data bank. The avoidance of this scenario in the West has nevertheless resulted in a series of discrete data banks that are not yet fully integrated, yet have tremendous potential for active and passive surveillance of individuals by governments and corporations. The U.S. Congress' Office of Technology Assessment remarked in '88 that:

"A de facto national database is actively being created, although in a piecemeal fashion. It is the proliferation of data banks rather than the existence of any single one of them that poses the fundamental challenge to privacy interests. When personal data exists, they will be used, not always to the benefit of the individuals."

A group of American sociologists concluded that, and I quote them:

"Mass surveillance through personal documentation feeds on itself. The more important events in life entail production or consumption of personal documentation, the more feasible it is to institute effective surveillance through direct checking based on such data. Imaginative administrators of surveillance organizations are constantly seeking new uses for personal data in these ways."

Perhaps a 1974 French book announcing the end of private life was simply premature since the technical feasibility of a world without much physical privacy is fast approaching. (I am going to skip over something to comment on the automation of the workplace and the kind of surveillance that that makes possible.)

Another aspect of the development of surveillance societies is the widespread efforts to introduce such evasive technologies as the polygraph and urinalysis, for obvious purposes. These typify both the entrepreneurial search for an application of newly developed technology and the naive quest for technical solutions to such serious social problems as low productivity, employee theft and drug and alcohol abuse. Rather than management identifying an important issue and then turning to the technocrats for a solution, technological advances are driving the process of problem identification. The California inventors of a urinalysis machine, appropriately called "EMIT", naturally sought a market for their error-prone product which, one need hardly add, was first tested and used on prisoners. A classic example of the powerless in society and a group whose claims to the most elemental forms of human dignity face an uphill struggle. Scientists are also developing computers that will track people through their neural networks and the pattern of their genetic information.

To counter suggestions that the idea that surveillance societies is far-fetched, it is worth reflecting on the known surveillance capacities of national intelligence agencies. The key achievements are physical observations by satellite cameras and electronic interceptions of communications by a wide variety of devices. Any person can be the target of such surveillance if the political will exists to do so. The U.S., for example, has long intercepted the conversations of Soviet leaders as they drive about Moscow in limousines. During the Achille Lauro hijacking episode in 1985, the National Security Administration provided the Reagan Administration with almost instant access to the telephone communications of the Egyptian president.

All telephone conversations routed through microwave towers in Washington, D.C. are routinely received by the Soviets who permit the Americans similar free range in Moscow, in what Bob Woodward refers to as a "massive invasion of the privacy of citizens". Such extensive tapes are fed directly into computers for key-word analysis. Furthermore, the U.S. developed a capacity to tap Soviet undersea communication cables by the use of submarines and an electronic pod that was almost impossible to detect. These extraordinary revelations are no doubt only the tip of the iceberg of current capacities. Other intelligence studies suggest that surveillance and non-compliance with basic controlling laws is not a recent phenomenon. In "Spy Catcher" Peter Wright reveals that MI5, the British Domestic Intelligence Service, long had undercover officers posted in the Newcastle Headquarters of the National Insurance office of the Department of Health and Social Security in order to supply data on demand on almost the total population of Britain. When the decision to automate was finally made around 1970, MI5's main concern was to try and establish computer links to the proposed Newcastle computer. It is a little ironic that yesterday Mrs. Thatcher's Government announced plans to subject MI5 to domestic regulation by statute for the first time.

The most surprising result of this tie-in they want to the computers, to the Newcastle computer, would be if they were hindered in their desire for continued access to information. Massive surveillance capacity already exists through data banks and surveillance activities, especially in the private sector, and are almost completely unregulated. For example, eight of the ten provinces in Canada do not have data protection legislation for the public sector. Our own legislation has only come into effect this year, after more than a decade of discussion. The record of American states is similarly deficient. In North America, information technology is galloping ahead of regulation and control, especially in the private sector where the public must largely rely on self-regulation.

European examples of surveillance are also common as the example of Sweden, the prototype of a surveillance society illustrates. I will not beat up on the Swedes today by educating you on the extent to which they already live in the kind of surveillance society that I would like to avoid in North America. Thank you.

Dr. Ann Cavoukian
Director of Compliance
Office of Ontario's Information and Privacy Commissioner
Toronto, Ontario

Thank you David. There is no doubt in my mind that privacy issues will become the prevalent issues of the '90s. Such things as AIDS, genetic screening, polygraphs, urinalysis and other forms of testing at the workplace will demand our attention and our collective concern. But that's not what I am going to talk about today. Today, I am going to restrict my talk to computer-matching. For those of you who are already familiar with this area or have heard me speak on this topic before, I ask that you bear with me. I assume that there are some people here who are not that familiar with the topic and so I am going to speak at a very basic level this morning. For those of you who were in the earlier session, Evan Hendricks spoke of the computer-matching experience in the United States, which was very informative. So, my approach will be very basic.

Starting at square one, what is it? Computer-matching is simply the linkage of data or records through the use of computers. The match between several different databases is usually accomplished through the use of a universal personal identifier such as the Social Insurance Number. Such identifiers are the common element or link between different databases and enable a match to take place, but there are many other ways as well, in the absence of the SIN, to effect comparisons among relational databases. On the surface, computer-matching appears to be a great benefit to society in that it could enable the detection of individuals who defraud the Government. After all, no one condones the behaviour of those who defraud or otherwise abuse publicly-funded programs. Take for example, individuals who receive certain benefits, such as training assistance, or social assistance because their income is below a certain level -- $10,000. A computer match to detect defrauders would simply run the database containing the names of all the individuals receiving the particular benefit against a database of individuals with an income of $10,000 or more. The computer would be instructed to generate a list of people whose names appeared on both databases.

At first blush, it would appear that this type of computer match will be of great benefit to us all. If, however, one takes a closer look, as I hope we can do today, the flaws related to the computer-matching process may clearly outweigh the benefits.

First of all, there is no magic about information contained in a database or computer. Errors abound both of a clerical nature due to incorrect data entry, or from simply having incorrect information about a particular individual on file. In addition, information in databases may often be incomplete and thus incorrect due to certain, possibly very important, omissions. The list of names that is generated as a result of a computer match, is commonly referred to by the Americans as a "hit list", quite appropriately so. Once a computer match has taken place, and a so-called hit list is generated, then it is imperative that the resulting list of alleged abusers be investigated and given an opportunity to repudiate the information. This concept of due process is firmly entrenched in our justice system and should certainly be extended to alleged abusers in this area. The concept of innocent until proven guilty surely should not be ignored in this context.

In the United States, this concept of due process and the need to investigate individuals named on a list has at times been ignored. As Evan pointed out, certainly in the earlier years it was ignored considerably and the benefits were often cut off on the basis of a raw match or raw hit. This simply means that the benefits in question were cut off automatically upon generation of the list without any subsequent investigation, resulting, in some cases, in disastrous results. Computer-matching has in the past been very popular in the United States and through their experience, we have learned that the concept of cost savings through such matches may in fact be a myth. If one has the proper and necessary investigative stage following the generation of a hit list, then any anticipated cost savings may in fact disappear with the inclusion of this critical stage.

Now, if little cost saving is achieved as a result of computer-matching, while the threat to our privacy posed by such a process is considerable, then perhaps the entire concept of matching and its resulting gains must be carefully analyzed and reviewed to determine whether it is really worth the price. The bottom line is, should everyone be watched by computers for the sake of apprehending the few who are guilty? As David Flaherty mentioned, do we want a surveillance society?

The United States Congress very recently passed an Act, The Computer-Matching and Privacy Protection Act, providing a legislative framework that precludes the type of indiscriminate computer matching that I just described and has introduced strict guidelines to govern matches that are conducted. I will not go into the details of this, Evan Hendricks did discuss the details this morning and we can discuss them later if time permits. The Federal Government of Canada, has also recently developed a similar policy governing computer matches at the Federal level which I will outline a little later in the talk.

Let me give you another more personal example of computer matching that may hit a little closer to home. Suppose you have just a filed an income tax return and you are due to receive a refund of $4,000 or $5,000; would it not be wonderful? Now, all the information pertaining to your income tax, including your refund claim, is, of course, on record with Revenue Canada, which correctly uses the information for the purpose for which it was intended, namely the collection of taxes. But suppose too, that some other Government agency collected personal income tax information indirectly about you for a purpose for which the collection was not intended and that you were not aware of. Suppose that that agency happened to have records showing that, at some time in the past, you took out a student loan which you never repaid.

Hypothetically, that agency could match your income tax data with your student loan data through your Social Insurance Number which is common to both databases and decide to appropriate your income tax refund as repayment of that old student loan. Many people, I suspect, would say that sounds perfectly justified; after all what is wrong with using modern technology to ensure that various public programs are not abused?

Let us reconsider this for a moment. What if you had actually paid off that loan, and through no fault of your own, no record of that repayment was ever entered into the proper database. Or what if it was entered by mistake under someone else's name, another John B. Smith whose date of birth was 09-02-52 instead of 02-09-52? These things happen. It certainly would not be the first time and you know it will not be the last. I think that most people can see the dangers of allowing governments to use information for purposes other than the purpose for which it was originally collected. I am sure that each of you, given some time, could think of many other examples of a similar nature that might occur. Maybe there is an outdated note on a program somewhere listing an old lien against your house, or an old court judgment against you for child support, or a supposedly an unpaid traffic fine, or whatever. So, while it may seem like natural justice to match a financial obligation against a Government rebate, it could constitute a grave injustice if it is done automatically and without giving you an opportunity to state your case, to assess the information, and to set the record straight if an error has been made. At the present time, so far as we are aware, the Government of Ontario is not engaged in the type of computermatching that I just described. I hope that before any consideration is routinely given to this practice, we learn from the American experience and ensure that sufficient due process safeguards are introduced at the outset. Furthermore, I hope that our Agency is consulted in advance to ensure compliance and consistency with the principles of our Act.

Now, there are many types of computer-matching other than for the detection of people who defraud the Government. You yourself may be engaging in this practice right now without any awareness of doing so. For example, sharing information that you have in your Ministry with another Ministry or agency, or perhaps even with another department within your own agency or organization. Would this be considered computer-matching? "Maybe." It would, of course, depend on the specific fact situation and more importantly, what the other Ministry or organization intended to do with this information.

Do they want to compare the information or add it to an existing database of information that they presently hold? If so, what do they intend to do with it? Will they do the comparison at a nominal level where the information is personally identifiable or will they aggregate it? If they choose to keep it a nominal level with a personal identifier, then most likely an identifier such as the SIN or name and date of birth, will be used to effect the comparison. This type of sharing of information through computer networks or databases would be considered computer-matching as much as the examples I gave earlier, although certainly the intent would clearly be far less sinister. No matter how innocent, however, all cases of persons engaging in data sharing where information is indirectly collected from a source other than the individual to whom it relates, contravene our Act as it stands now, and such persons are guilty of an offence. There are, however, some cases in which data sharing may be appropriate and very advisable. We have a vehicle within our Act which permits some instances of indirect collection. These practices may be continued under s.59(c) where the Commissioner may, and I quote:

> *"In appropriate circumstances, authorize the collection of information otherwise than directly from the individual."*

If you think that you or your office is engaging in this kind of activity, but you are not sure, or you think it is a very worthwhile project that should in fact be continued, then contact us, and let's talk; it is really that simple. We have already been contacted in this regard by several Ministries enquiring about a waiver of indirect collection under s.59(c), and I believe that we have reached very satisfactory solutions in each instance. For your information, Quebec has had 61 cases between 1984 to 1988, of Government agencies seeking approval for computer-matching programs. It will be very interesting to see how many we receive.

As I mentioned earlier, the Federal government recently developed a very detailed computer-matching program or, as they refer to it, 'data matching policy'. John Grace, the Federal Privacy Commissioner, feels that, and I quote:

> *"Canada may have the world's most rigorous controls on the use of computer technology to compare and compile computer information extracted from records contained in unrelated databases".*

I will, very briefly, outline the main features of this policy: No matching shall take place without the written approval of the head of the institution. All proposed matches must have proper documentation consisting of a preliminary assessment of a match's compliance with the Privacy Act, the Federal Act, and a cost-benefit analysis of the proposed match against an assessment of the potential threat to the privacy of individuals. All data-matching must be reported and described in the index of personal information, similar to our register of personal information. Proposed matches must be submitted to the Privacy Commission sixty days prior to the scheduled commencement of the match. Any information generated from computer-matching must be subjected to independent verification prior to its use in a decision-making process directly affecting individuals. Finally, an individual must be given the opportunity to refute the information yielded from a match before any action relating to that individual is taken. An excellent policy.

In conclusion, computer-matching is, of course, just one of many ways in which a Government might conceivably violate your right to maintaining personal information and the privacy of that information. I do not have time to explore the many other areas which may violate your privacy, but I know that our next speaker will. I have been talking primarily about the technological side of invasions to our privacy and Connie Mahaffy will be looking at the more personal and human side. Thank you very much.

Connie Mahaffy, Coordinator
Freedom of Information and Privacy
Ontario Ministry of Correctional Services
Toronto, Ontario.

November 23rd, 1988. I applied for a job today with the Ministry of Information. I gave them my application and my resume. They, in turn, gave me a letter that said they had the statutory authority to collect personal information about me and that they would only use my personal information for the purpose for which it was collected or for consistent purpose, whatever that means. They even asked me to sign a letter of authorization allowing them to check with my references. I was impressed. I never have to worry about the misuse of my personal information while it is in the possession of the Ministry of Information.

November 23rd, 1998. Today I applied for a position with the Ministry of Information. They weren't too interested in my application or my resume. Upon arriving for my interview, a gentleman, in a white coat, ushered me into a sterile examination room. He said they needed a urine sample. Then he took my blood. You see, they don't want to hire anyone with a contagious disease. He attached electrodes to my brain to see if I was prone to depression or moodiness.

Well, you can't blame them for not wanting to hire anyone, particularly a woman, who has emotional problems or mental illness. Yes, they did ask me a few questions but only after they had hooked me up to a polygraph machine. I told them I had nothing to hide, but they wouldn't believe me. You can't expect an employer to want to hire anyone who can't differentiate fact from fiction. Finally, they fingerprinted me, and after I was cleared by the police, I was offered the job. There was a condition of employment, though. They attached an electronic bracelet to my wrist. It's not so bad though, once you get used to it. It beeps right at 7:00 a.m., so I am never late for work any more. It goes off again at noon reminding me to take my lunch and again at 1:00 telling me to get back to the office. No one needs to go on the time management course any more. Yes, it's true that if you ignore the beep, you do get a bit of a shock, but it doesn't hurt too much. I am so lucky to be able to be working for the Ministry of Information.

Why are you all looking at me like that? Don't you understand that this is the age of access to information, electronic surveillance and the presumption of guilt? Don't you know that no one has the right to genetic or physical privacy anymore? Everything now is done in the name of the public interest. It is we, the people, not any one person that counts. And besides, if I had refused to wear the electronic bracelet, they would have passed me by and offered the job to you.

In her novel "Anthem", Ayn Rand depicts a futuristic society where from cradle to grave the crowd is one great "WE". Upon re-discovering the "first person singular", the protagonist, Equality 72521, has this to say:

"But I still wonder how it was possible in those graceless years of transition long ago that men did not see whither they were going and went on in blindness and cowardice to their fate. I wonder for it is hard for me to conceive how men who knew the word I could give it up and not know what they lost."

The chilling reality, my friends, is that the scenario I have described from 1998 is actually occur-ring today. In the United States, it has become common place for employees to be subjected to fingerprinting, lie detectors, urinalysis, psychological tests, blood tests, computerized criminal record checks, hand writing analysis, and perhaps, thanks to Nancy Reagan, clearance by astrology. So pervasive has the use of the polygraph become in the American workplace that last June, President Reagan signed the Employee Polygraph Protection Act which will become law, next month. With a few exceptions, the Act will bar the use of lie detectors for private sector pre-employment screening. The law will permit the use of polygraphs by employers only for cause and in connection with an on-going investigation involving economic loss or injury to the company.

Interestingly, federal, state and local government employers, i.e. those with a political heartbeat are completely exempted from the Act. In his 1987/88 report, our Federal Privacy Commissioner cautions us that the use of the so-called objective and impersonal tests becoming routine in some places is not yet out of control in Canada but unless care is taken, we may be seeing our future elsewhere. As we begin to monitor offenders electronically in Ontario, which has been the practice for some time in the United States and British Columbia, do we really think it will be all that long before hi-tech surveillance methods are applied to Canadian employees, the aged, the homeless, our children?

Are we prepared to live in an "I frisk you; you frisk me" transparent society and to succumb routinely to intrusive physical tests which compromise our very privacy and dignity in order to have a disease-free, lie-free, criminal-free workplace? I think it will be interesting to see what role the Canadian unions will play in negotiating on behalf of their members' privacy protection into their collective agreements in the future. But let's leave the workplace for the moment and turn to an area that is a little closer to home for me.

The latest hi-tech development to be added to the list is eye-print identification, currently in use in Illinois. Unlike fingerprints, the retinal pattern in a person's eye cannot be altered. Not surprisingly perhaps, this new electronic identification technique is being tested on prisoners in state correctional facilities. I would like to just highlight for you some of the current privacy issues within the correctional system where the right to privacy always takes a back seat to security. Most of you in this room probably have never been inside a prison and probably hope that you never will be. I spent five of my last twelve years in Corrections behind the barbed wire fences and I can attest to one fact and that is, that you don't know what it's like to do time unless, of course, you've been a prisoner. But you can appreciate that institutionalization, in this case, imprisonment, is characterized by the systemic deprivation of personal privacy.

Imagine a life where, in the name of security, you must eat, sleep and defecate under the watchful eye of your caretakers and even your peers and you may not even be sentenced yet but patiently awaiting trial and legally presumed innocent. In a world so devoid of privacy, is it any wonder that inmates react vehementally to perceived intrusive violations of their personal privacy? A couple of years ago, inmates resorted to the courts to test the legality of random drug testing in federal prisons. They won the case when a Quebec Superior Court Judge ruled against random drug testing at Canada's Federal Collinsville Prison on the basis of the Charter of Rights and Freedoms. Our Olympic athletes should be so lucky!

Just as no prisoner in Canada can be randomly tested for drugs, so no prisoner can be routinely screened for the presence of positive AIDS antibodies. An inmate may request testing or be encouraged to be tested but in the final analysis, the courts have upheld his right to refuse medical intervention in this regard. Inmates also have concerns about how their personal information is used and disclosed. For example, an inmate is diagnosed as having a communicable disease. He fears for his safety if his fellow inmates find out. An inmate is being released on December 1st, 1988. He doesn't want anyone to know his release date because he fears reprisals on the street. In my job, I get a number of collect calls from inmates across the province. I think the word is out, "Call Mahaffy and you'll get access to your institutional file" but anyway, one of the recent calls that I did get was an inmate who was very concerned that, and in this case, it happened to be the federal correction authorities who had, he said, violated his personal privacy because they had given his release date to his ex-common-law, the victim in this case. The victim, of course, feels she has a right to know when a certain inmate is getting out. Her personal safety is at risk. The police feel they have a right to know, too. The public safety is at stake.

An inmate wants to read the documents the Parole Board read which led them to deny him parole. The Parole Board maintains the documents were provided in confidence. He has to settle for the gist of the information. An inmate wants his correspondence to and from the Privacy Commissioner to be treated confidentially. In the interest of security, the correspondence is opened, inspected for contraband and possibly read. It matters not whether you are an inmate, an employee, male or female, young or old -- we all value our s.7 entitlement under the Charter of Rights to life, liberty and the security of the person.

One of the most important components of privacy, says Alan Borovoy in his newly released book, "When Freedoms Collide", is the subjective experience of it. "While privacy is not absolute," he says, "it is nevertheless central to democracy." Similarly, I would say that the most important component of the abuse of privacy is the subjective experience of it. We don't want our privacy to be violated through electronic surveillance or the latest in some new testing method and we want to maintain ultimate control over our own personal information, be it in the custody or control of the private or public sector. We know what the rules are with respect to the collection, use and disclosure of personal information in the government. Why should we have to play by different rules in the private sector? Everyone's personal information should enjoy equal protection under the law.

It is evident that these emerging privacy issues extend well beyond the scope of current privacy legislation. Rather than be pro-active in this area, the Federal Government has opted not to extend the statutory provisions of the Privacy Act to cover a wider arena of emerging privacy rights. In its 1987 report entitled, "The Steps Ahead", the Government says that it believes the Privacy Act should concentrate on data protection matters and only regulate the collection, use and disclosure of information about individuals produced by such surveillance and tests.

However, the Government will monitor surveillance and testing activities to determine whether action is required. Are you reassured? The Federal Privacy Commissioner acknowledges that the possibilities of violation are enormous and that "... a broadening of the Act's universe beyond governments would be justified by demonstrable and endemic abuses of privacy."

The report goes on to say, however, that pushing privacy legislation where it is not necessary would make it a burden rather than something valuable. Privacy protection would become big and expensive business. No one would gain from that. I disagree. I think abuses of privacy are going to become big and expensive business. An individual has a great deal to gain from a Privacy Act that embraces the private sector. Take the case of Mr. Robert Bork, who was nominated as a Justice to the United States Supreme Court. Do you recall reading about the published list of movies that he had rented from a video store, courtesy of a video outlet and a persistent Washington reporter? No Supreme Court Judgeship for Mr. Bork. What movies and books have you signed out recently?

And closer to home, a Toronto newspaper recently advised the world that Ben Johnson, with all his other problems, has a few liens outstanding against his fleet of automobiles. We scarcely bat an eyelash at these intrusions of privacy into the lives of public figures. We take it for granted. But doesn't it cause you, even for a moment, to reflect if public figures experience these violations of privacy, what about the type and frequency of abuses of your personal information behind the scenes?

Those who hope that the private sector will respond to emerging privacy issues through self-regulation are no doubt the eternal optimists in our midst. I think the day will come when Governments will be required to react legislatively to the demonstrable, endemic abuses of privacy when instead they could have prepared the way today for their prevention. In the absence of broader legislative safeguards, advocacy on behalf of privacy protection becomes all important. I think it is interesting that unlike environmental issues, women's issues, animal rights issues, the protection of personal information which is intrinsically linked to the protection of privacy, lacks a grass roots constituency and has yet to emerge as a cause celebre.

When you submit a request under the Act to access information, you become a self-appointed advocate with the right to appeal, but who is your advocate when it comes to safeguarding your privacy and your personal information? To whom do you relinquish this sacred trust? Federal prisoners have turned to the courts in an attempt to curtail what they perceived to be intrusive violations of their privacy, but we should only have to turn to the courts for direction, I would hope, as a last resort.

In conclusion, last week I received a call from the Commissioner's office. The caller said, "Ann wants to know if the Ministry of Correctional Services gives condoms to inmates." Well, in case you're interested, we don't, but I was naturally curious to ask Ann the next day what she and Sid were up to now? We are developing a policy on AIDS as we see this as a critical privacy protection issue, she said. It's reassuring to know that Mr. Linden is assuming the role of watchdog on emerging privacy rights in Ontario. Like his Federal counterpart, Mr. Grace, Mr. Linden recognizes that the issues are complex and the price of privacy erosion costly, particularly in human terms. So I'm glad, Mr. Linden, that you are rising to the challenge because my friends, I have a confession to make. I don't really want to work for the Ministry of Information in 1998. Do you?

David Flaherty

I am grateful to the speakers for not only the quality of their presentation but also sticking pretty much to our schedule. So, we have some time for discussion. Frank White has assured me we can go to four o'clock with no problems. I'm jesting. So, we'd be delighted. It's the end of a long conference. We would be delighted to have both comments, questions, anything you want to say. We welcome it. There are microphones here for your use.

Audience Question (Unidentified)

I heard the phrase " cost benefit analysis" in your speech today and I heard it yesterday and maybe I've worked with privacy matters too long but I really don't understand what costs and benefits have to do with protecting privacy?

Ann Cavoukian

Well, the cost benefit analysis that is envisioned in the United States in this Act and here, I suspect, is you would estimate the cost of the computer match would be and factor in what the cost of the investigative stage would be afterwards in terms of sending investigators out to investigate hits or matches, that whole process. So, you determine what the cost of the entire process is and against that, you would estimate what your expected return is in terms of finding defrauders. So, the idea is, it's going to cost you "X" number of dollars, you anticipate collecting "Y" number of dollars in terms of finding out about defrauders and if that comes out in the plus side, as opposed to the negative side, then that's one thing in favour of the computer match. These are not my words. I am describing you the process that's envisioned.

David Flaherty

Could I simply add that in the Reagan years, it has been very difficult to find a constituency that values privacy in the United States. So, that small lobby in Washington that produced the computer-matching Act this year used whatever arguments they could possibly use against computer matching including the need to protect privacy. We still live in a society where, despite the lack of constitutional protection for personal privacy, we are innocent enough, in a sense, to think that privacy itself is a value that deserves protection. If you read the House of Representatives report on this computer-matching bill, you will find the privacy rationale for the legislation practically buried. They've gotten every other reason under the kitchen sink they could possibly use to persuade Congress to act and then miraculously to get President Reagan to sign the bill. So, it's a bit of a game.

Diana Sepejak

I work at the Ontario Board of Parole. Routinely, Board members have to consider a CPIC report on inmates that we are considering for parole and CPIC details criminal history, not only convictions but charges that were originally laid and then an acquittal resulted. Now, the routine direction to board members is to ignore that information. What I would like to know and this applies to that kind of information as well as others, but there are provisions under the Act for accessing the record for purposes of correction but what about provisions or guidelines with respect to accessing a record for purposes of removal of information that might be seen as prejudicial or irrelevant that kind of thing? I'm thinking about the protection of privacy in terms of accessing for the purpose of surveying what a government agency has on you and then, perhaps, trying to have that removed, if possible?

Connie Mahaffy

I don't know if there is anyone in the audience representing the police community because I know the police are not prepared to, at least my understanding is they are not prepared, to expunge their records. Even I think perhaps if you have a pardon, that may be one circumstance but otherwise, they're not too inclined. I think for, and Diana come back to me if this doesn't satisfy you, but I think that with respect to disclosure of police records, inmates routinely receive the RCMP fingerprinting sheet from us and after it has been approved by the RCMP for release. The only thing the RCMP are concerned about about that document is any information that may be there that's been provided to them by foreign police forces, provided to them in confidence and they would ask us to sever that, but I think that for parole board purposes, it's all right. I mean, I don't have a problem with information maybe being incidental to the actual decision that is going to be made as long as the inmate has full access to that information. So, I mean, I don't know if your concern is the parole board setting that he has all these charges and they've all been withdrawn, I think it's an interesting human rights issue. I don't think that the police are prepared to withdraw it. I think as long as the inmate knows that it is there and they do, as you know, they do get access to the document. Then, it is not like they think that the board is considering something that they are not aware of.

Diana Sepejak

I used that as an example because it's fresh on my mind but I am thinking, for instance, if I accessed my employment record and there was something on it which may in fact be true, and in fact correct, but I didn't feel that it was relevant for an employment record purpose.

Connie Mahaffy

Under the Act, the Act allows that in terms of the right to correction, that if you find there is an error in your record, an error or that there is an omission, then you can request it be corrected and a lot of staff have raised this issue. What if something is one the file that I don't think should be there? That is not within the jurisdiction of the Freedom of Information and Protection of Privacy Act. That's a management/employee decision as to what is on that file, particularly in terms of a personnel matter. That's beyond, and someone else can correct me if I am wrong, but that is my understanding. It is beyond the purview of the Act. That is a personnel matter, an administrative question.

David Flaherty

Could I simply add that CPIC is an example of an outstanding, unfinished piece of data protection business. I wrote about it in the University of Toronto Law Journal about three or four years ago and in fact used CPIC as an example of a self-regulation in the data protection field where the RCMP has done quite a good job but then when the Justice Committee of the House of Commons in 1987 attempted to extend the Privacy Act to completely cover CPIC, we were met with the argument that it is a federal/provincial data bank and until you get federal, all of the provinces in Canada with data protection, until you get the Privacy Commissioners in Ontario and Quebec and federally, working specifically to deal with the serious problems of CPIC despite all the accomplishments of the RCMP in protecting the data, we're still going to have difficulties. So, I was a little concerned that this panel was on problems of the future. The problems are current problems of implementing current legislation and given the experience of other countries, that's going to go on for a long time. The first thing to do is to try to make the Ontario Act work and to make the Quebec Act even more successful and to continue to put teeth into the Federal Act and have enthusiastic implementation of it.

Peter Gillies
Treasury Board Secretariat
Ottawa, Ontario

I just wanted to say a few things about computer-matching, since my organization is the only one who has actually in Canada negotiated with 140 institutions to put in place a computer matching policy and the first thing is, I think, we are putting an awful lot of emphasis on fraud when we are not doing much of that type of matching, having done the studies and I think for people here, whether it is municipalities, provincial government or federal government, it really comes down to a lot of front-end verification that is going on and to address the question that the gentleman had about cost-benefit analysis and, having also done a few of those, with privacy, it is not an easy matter and to give you an example. If you have the Immigration Department and you have security and law enforcement agencies, and they are exchanging data and they are matching. The fact that one terrorist gets through is really what is at stake in those operations. So, it is not a simple, "Well, we are making $100,000 on this side and it is costing us $50,000 to do the match", it's very complicated analysis that has to go on and I would hate us to gaze upon the Americans as the way that fraud is what we are doing here because it is not. Anything I have seen, we are doing very, very little of that.

Number two, I think it is incumbent upon me to respond to some extent about the government's position on the Privacy Act. The position that we took at the time was that the Privacy Act as we see it right now in the information sense, deals with all the issues I think today that have been raised as future issues in an information sense. We are doing stuff on AIDS policy. We are doing things on identification bands. We are doing things on every technological thing going, based on the information approach and what we are very afraid of, and what I was hearing this morning in the medical field, is that if we get away from that and we make the Privacy Act either omnibus legislation or we get into specific legislation for each of those areas, we are going to have a lot more difficulty in getting politicians and senior administrators in government to accept the controls that are reasonable for the protection of privacy in the future and I would say, and it has not been mentioned on this panel, that that is the largest and most challenging field for everybody here is to sell to your deputy minister or CEO back home that you build privacy into everything you do. Those are my comments.

Ann Cavoukian

Thank you, Peter. I couldn't agree with you more on what you said near the end. As to your comments at the beginning, I certainly agree with you that computer-matching, there are some cases where it is not only advisable, it's desirable to have the matching process take place. As I indicated, I'm not aware of such matching programs in terms of the defrauding aspect in Ontario. It may go on, I'm just not aware of it. It is certainly not prevalent. When I visited Washington a short time ago, they place a lot of emphasis on the defrauding aspect of it and so, my experience with matching in the U.S. has been associated with that but clearly here, in those cases where it is advisable, as you mentioned, the cost benefit analysis, financial cost benefit would only be one aspect of the analysis that you would perform. You cannot -- the example you gave of the terrorist, attaching some kind of weight to that, I mean it's a very subjective matter and you have to approach it in that manner and I hope that if we are approached with examples of computer-matching, we will apply a very reasonable approach to it.

Anne Gray, Coordinator
Freedom of Information and Privacy Ontario Ministry of Consumer & Commercial Relations and Ministry of Financial Institutions

I've had a number of phone calls from people who I was not able to help. They were extremely upset by what they saw as intrusions of their privacy but it happened in the private sector, essentially. There was one person who was having trouble with their condominium corporation, who had received a letter on them and they would not show them the letter and they wouldn't tell them who it was from but they were kicking them out or something. There was a woman who had received a phone call from a creditor who wanted to be paid back and they said, 'Well, how about if we send you a cheque now and we send you these cheques for these amounts later?' and the creditor said, 'No, I know you have $5,000 in your bank account and I want it right now.' The woman's husband had been ill. They had financial difficulties. They were very upset about how did these people find this out. Connie said that there is no sort of a grassroots movement for privacy. I was wondering, you're the experts, do you see privacy legislation extending to the private sector, say by the end of the century?

Connie Mahaffy

I recognize privacy -- Sid Linden said earlier today that privacy is an important part of our society. I think it's a fundamental right of every single person and I don't think people who are working in the private sector or serviced by the private sector should be disenfranchised in terms of how their personal information is collected, used and disclosed. You know, and so I would hope, all I can say is I do not know whether it is going to be but I would hope so.

David Flaherty

Let me just say that if you look at the experience of other countries, the Swedes, West Germans, the French, even Margaret Thatcher's countrymen, have regulation of the private sector. In fact, in Britain under the crazy British Data Protection Act of 1984, every user of a computer that has personal data in it has to be licensed, at a 40 pound biannual registration fee. That was her idea of data protection in 1984, quite unusual from that source. So, if you look at what the rest of the Western industrial world has done, it's obvious that our private sector is going to have to be regulated in due course. Federally, we have taken the step to extend the Privacy Act to the federally regulated -- or at least the Crown Corporations so far and the Parliamentary Committee wanted it extended to the federally regulated private sector, as I recall. The difficulty is, I'm one of these probably naive liberals that Connie referred to and I think some other privacy advocates in this room are in bed with me on that one, who have assumed that the private sector would have the intelligence to self-regulate. The evidence is that they haven't. The Canadian Bankers Association has not yet issued its privacy code. Some suggest it isn't very strong anyway. The Royal Bank, to the best of my knowledge, has not issued its privacy code despite the fact that a pretty good code has been developed. The only Canadian bank with a privacy code in place at the moment is the Bank of Montreal. So, the private sector, in my judgment, has simply not risen to the occasion and the handwriting is on the wall but how can you argue for regulation of the private sector when you get a province like Ontario without legislation until last year. Now, the first thing to do is for the provinces and for the public sector to put their house in order because I believe that the government is the biggest threat, not maliciously but indirectly.

Ann Cavoukian

A very brief comment. I don't have a crystal ball either, so I have no idea whether it will happen or not. My hope is that it would, but in the meantime, what I suggest to people is simply because something is in the private sector, doesn't mean that you cannot refer to the Act and ask for voluntary compliance. I know that doesn't have a lot of strength, it doesn't have a lot of teeth in terms of enforcement but, an example I will give is the Credit Bureau of Greater Toronto. The Commissioner and I visited with the CEO and some of her staff and were very well received. Everything was shown to us. You could see they wanted to comply in whatever way they can because they do not want to be regulated by the government. So, to the extent that they can, they were very helpful, cooperative and when I have complaints about it, I'll call the CEO, who I know now, and she will receive my calls and try to answer my problems as much as possible. So, all I say is just because it is in the private sector, don't assume that they don't care at all. Try to refer to the Act if you get involved with it and see what you can do.

Anne Gray

I send them all to you right now.

Ann Cavoukian

I know.

David Flaherty

The last question will be quite fittingly from my friend Gerry van Berkel, who is the Legal Advisor to the Privacy Commissioner and I'm an unpaid public P.R. flack for that office.

Gerry van Berkel

Well, I was going to introduce myself but you've done it very well. David and I have, from time to time, sparred about CPIC and I was startled to hear someone say that the CPIC found its way into the files of a parole board. My understanding is that CPIC is for use of the police forces themselves and that if information gathered from that is given to the parole board, surely the police should take out of it that which is not necessary for the parole. One of the things that was brought up is the fact that if you receive a criminal conviction, a criminal record is registered with the Mounted Police. There is a Criminal Records Act that allows you to have that removed from your file if you have been behaving properly for three or five years, depending on whether you were tried by summary conviction or by indictment. However, there is a loophole in the law that if you've been arrested 25 times for a particular crime, never tried, never convicted, that never comes off the CPIC system. It is something to me that is abhorrent as someone who works in the privacy field. So, that's my comment. As to David's first comment that I won't go to a privacy and access seminar if he is not there, it has something to do with my blood pressure and his blood pressure. Sometimes, when we are both in the same room, there is blood pressure raised on both sides. It's been very enjoyable.

Frank White

If you will bear with me for just about three more moments, that's about how long. I think first of all, we should show our appreciation to this excellent panel. I think we should watch out because I think that to a government, the Minister of Information would be quite attractive as a name. They might want to review something like that. The Commissioner's speech is available if you would like to contact his office at 963-3333 for a copy of that, Toronto area code 416. I just have a few comments I'd like to make in, I guess, wrapping up this what I feel has been a very, very successful conference.

I sort of go back to something that was said very early in the conference. Three words from Inger Hansen and that was "information is power" and as we talk about the appropriate balances, we talk about who has access to general information, who makes decisions? Who gets notice? It almost seems like intertwined with that is that notion of balance and decision-making is this "information is power". When we take a look at the protection of privacy side, protection of personal information, what does government do with that personal information that they maintain about you and I? Again it is a question of power in whose hands and what is the appropriate balance in terms of making decisions? I think what we have as a tool now in Ontario is something that is quite appropriate to determine that balance with. We have our Freedom of Information and Protection of Privacy Act, so we have some rules of the road and I know we can interpret them quite differently but I think we have some rules of the road and I am personally quite thankful that this piece of legislation has been developed, implemented and is in force now. If you would like to look at the past two days, I really believe it's paying tribute to those individuals who worked so hard over the past two years to get this Act in place, implemented and working smoothly. The process is working and I point to the Information Commissioner and his staff. I point to the staff in Management Board Secretariat and above all, I would like to pay tribute to the Ministry and Agency Coordinators, the Freedom of Information and Protection of Privacy Coordinators who have worked so hard over the past year. I think you can see by just a representative few of them who have been up here in front over the past few days, the high level of quality of the individuals that you have seen, just really terrific in terms of what they have done with this legislation. I would like to pay tribute to you.

I would also like to thank all the speakers and moderators. I think that they have just done a terrific job. Their quality and thoughtfulness of their presentations has really been significant in making this so successful and finally, but not lastly, I would like to thank you, as delegates, for your patience and in particular, for your enthusiasm. Thank you very much.

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